Case No. SC85889

IN THE MISSOURI SUPREME COURT

AMERISTAR JET CHARTER, INC. and
SIERRA AMERICAN CORPORATION,
Appellants and Cross-Respondents,

-vs.-

DODSON INTERNATIONAL PARTS, INC.,
Cross-Appellant,

HOUSTON CASUALTY COMPANY,
Respondent,

HOWE ASSOCIATES, INC.,
Defendant.

APPEAL FROM THE 16TH JUDICIAL CIRCUIT COURT

THE HONORABLE LEE E. WELLS, JUDGE

SUBSTITUTE BRIEF OF CROSS-APPELLANT DODSON INTERNATIONAL PARTS, INC.

Respectfully submitted by

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STATEMENT OF JURISDICTION

This case involves an appeal from a Judgment of the Circuit Court of Jackson County, Missouri, in favor of Plaintiffs against Dodson International Parts, Inc. arising out of the retrieval and transportation by Dodson International Parts, Inc. from an off-airport landing site of an aircraft owned by Sierra American Corporation and leased by Ameristar Jet Charter, Inc. Following an opinion by the Missouri Court of Appeals, Western District, issued January 20, 2004 and denial of rehearing or transfer by that Court on March 2, 2004, this Court ordered the case transferred pursuant to Rule 83.04 by its Order dated April 27, 2004.

STATEMENT OF FACTS

After Plaintiffs received $1,500,000 from Houston Casualty Company ("Houston") (Tr. 333:4-7; 363:21-23) for the claimed loss of a Falcon 20 aircraft purchased for $1,412,500 three months before its loss (Tr. 330:2-3, 388:7-9, 389:1-2; Def. Ex. 2), Plaintiffs sued to recover claimed loss of market value of the aircraft and claimed lost profits against Houston and Dodson International Parts, Inc. ("Dodson"), arising out of Dodson's retrieval and transportation of the aircraft to the downtown Kansas City airport and Houston's declaration of the aircraft as a constructive total loss. This appeal follows entry of a Judgment for Plaintiffs against Dodson on a jury verdict assessing Plaintiffs' damages at $2,100,000 and determining Plaintiffs 30% at fault and Dodson 70% at fault. L.F. 688, 915-916.

On April 9, 1998, Plaintiffs' Falcon 20 aircraft, attempting to land at the downtown Kansas City airport, landed off-airport (Tr. 167:1-9) on the levee near the river. The aircraft landed south of the Kansas City airport. Tr. 167:1-9. The left main outboard wheel on the left wing was punctured and deflated and the nose gear door was bent forward. Tr. 172:17-173:6. The hard landing indicators on the landing gear were not deformed. Tr. 177:21-178:7.

Sierra owned the Falcon 20. Sierra had purchased the aircraft for $1,412,500 in January 1998 (Tr. 389:1-2: Ex. 2) and insured it with Houston for $1,500,000. Tr. 330:25-331:2.

Sierra is a leasing company in the business of leasing aircraft to Ameristar, its only customer, and Ameristar leases all of its Falcon 20 aircraft from Sierra. Tr. 310:11-23, 384:1-4. An oral lease agreement provided for lease payments between Ameristar and Sierra, in amounts that depend on the airplane, but Plaintiffs' President did not know exactly which lease payments were on each airplane. Tr. 369:6-21. Sierra would get revenue from

Ameristar, reflected in accounting entries on the books, but was not actually paid in cash. Tr. 369:18-370:5. Ameristar leased the Falcon 20 in its business of hauling on-demand cargo. Tr. 319:24-25. Ameristar did not have contracts with its customers for ongoing cargo shipment business, but waited for vendors to call, exactly like a taxicab company Tr. 320:20-321:4.

Houston's adjuster, Howe, hired Dodson to retrieve and transport the aircraft to the downtown airport. Tr. 386:26-387:4. Ameristar's Director of Maintenance, Lyndon Frazer, originally retained someone else who could move the airplane within a couple of days but Howe hired Dodson because Dodson could move the aircraft more quickly. Tr. 544:7-13, 551:10-12, 672:20-22, 674:25-676:1. Dodson is in the business of retrieving aircraft, buying salvage aircraft and selling aircraft parts. Dodson has retrieved and parted out about 1600 aircraft. Tr. 522:17-25, 525:16-18; 527:3-6. Dodson's President, Robert L. Dodson, Jr. (J.R. Dodson) has supervised 200 to 600 aircraft retrievals, including the retrieval of four Falcons. Tr. 537:19-538:1, 542:11-16. J.R. Dodson has been personally involved in the hands-on retrieval and transportation of aircraft on about 200 occasions. Tr. 537:19-21. Of the 1600 aircraft Dodson and J.R. Dodson have been involved in retrieving, about 350 were in a similar class as the Falcon 20 in size and configuration. Tr. 541:19-25. Dodson had recovered four Falcon jets before this one. Tr. 542:11-16.

Dodson's Director of Operations, Jonathan Harnden, headed up the team to retrieve this aircraft. Tr. 194:21-195:2, 546:16-24. Harnden had worked for Dodson for approximately 13 years. Tr. 194:16-18. He holds an FAA certificate as an airframe and power plant ("A&P") mechanic, authorized to service, repair and maintain aircraft, and has been a certified A&P

mechanic for eight years. Tr. 224:6-21. He had been involved in the recovery and transportation of more than 700 aircraft, and on the recovery site of between fifty and 100 aircraft. Tr. 236:20-237:8; 546:25-547:5. Ninety percent of those recoveries were for airplanes that were going to be dismantled and used for parts. Tr. 260:5-11. Harnden had never dismantled a Falcon 20 before (Tr. 195:11-13), but he had disassembled a Falcon 200, which has the same fuselage, wing box, wings and empanage, but different engines and avionic equipment. Tr. 218:1-14. Dodson's team disassembled and moved the aircraft on Easter weekend because both Keith Brown of Howe and Lyndon Frazier of Ameristar had impressed on Dodson the urgency of getting the aircraft moved. Tr. 218:15-19, 544:8-19.

Dodson called three facilities to try to locate a center section fixture to hold the fuselage of the aircraft. Tr. 545:9-546:2, 608:16-22. Dodson's team moved the aircraft without a center section fixture or fuselage cradle being available. Tr. 199:20-24; 215:19-22; 242:13-15; 610:23-611:3. Harnden testified it would not be practical to use a wing trolley or fuselage trolley in the gravel lot where the aircraft was recovered because such trolleys are designed to be used in a hangar on a level, hard surface. Tr. 225:1-11. Dodson could have built an apparatus to match the curvature of the fuselage of the aircraft and support its weight evenly, but it would have taken a couple of days. Tr. 199:20-200:10.

Dodson's team removed the wings from the fuselage, but did not remove the engines from the wings. Tr. 198:3-11; 202:19-20; 216:12-16. Removal of the engines would have required an additional one to two days for removal and an additional four to five days for reinstallation. Tr. 227:2-15. They used a nylon strap supported by a crane to suspend the nose of the aircraft, folded the nose gear back and backed a flatbed trailer under the nose of the

aircraft. Tr. 234:14-22. The aircraft rested on aircraft tires and wooden blocks on the flatbed trailer. Tr. 199:11-16; 206:13-20. To move the aircraft fuselage under bridges between the levee and the airport, Dodson's team had to elevate the nose of the aircraft to lower its tail. Tr. 203:3-12.

Harnden testified the Federal Aviation Regulations define maintenance as any act that consists of a repair, inspection or servicing of an aircraft, but that "maintenance" under the regulations does not refer to recovery or transport of an aircraft. Tr. 239:15-240:5; 265:23-266:12. Harnden testified that what Dodson did with the aircraft was not maintenance. Tr. 254:1-5. He testified the manufacturer's maintenance manual does not apply to recovery and transportation of the aircraft over the road. Tr. 196:14-20, 207:16-23, 208:20-24, 218:20-219:9, 219:23-220:14, 238:10-21. Harnden testified the manner of loading and transporting the aircraft conformed to generally accepted industry standards. Tr. 240:17-25.

Allen King, a retired FAA maintenance specialist with 28 years' experience with the FAA, testified that FAA regulations require that in handling, disassembling, transportation, maintenance, repair and overhaul of any aircraft, the standard of care is the manufacturer's maintenance manual. Tr. 276:8-20. Mr. King testified that Federal Aviation Regulation 43.13(a) specifically provides that any person performing maintenance and alterations must use the methods, techniques and practices set forth in the manufacturer's maintenance manual and must use special equipment if specified in the manufacturer's maintenance manual. Tr. 276:21-17. In Mr. King's opinion, Defendant was required to comply with the manufacturer's maintenance manual with this aircraft in the field next to the freeway. Tr. 277:8-20. Mr. King testified that Dodson did not follow the manufacturer's maintenance manual in dismantling this

aircraft. Tr. 279:14-23. The use of an alternative procedure to that in the manufacturer's maintenance manual requires getting advance permission from the FAA. Tr. 280:17-281:12. Mr. King testified that Dodson failed to use an apparatus that matched the curvature of the fuselage, Tr. 286:16-18, the wings weren't supported as the manufacturer's maintenance manual recommends, Tr. 287:20-22, there was an indication the bolt holes were scored and corroded, Tr. 288:19-22, and the hydraulic lines were not capped and the hydraulic system was not flushed, Tr. 288:23-289:5.

Mr. King testified regarding the FAR definition of maintenance, but Plaintiffs did not introduce the regulation into evidence. Tr. 303:3-18. Mr. King testified that the FAR defines maintenance to mean inspection, overhaul, repair, preservation and the replacement of parts, but it excludes preventive maintenance. Tr. 303:5-9. Mr. King testified that disassembly and transportation of the aircraft is not inspection (Tr. 303:22-304:1), not overhaul (Tr. 303:2-3), but could be, possibly, in this case, definitely, repair (Tr. 304:4-13, 306:3-9). Mr. King testified that one cannot remove wings from an aircraft without calling it maintenance. Tr. 305:13-18, 306:10-20. Recovery, disassembly and transportation of an aircraft is not preservation. Tr. 307:6-9. The later replacement of parts did not have anything to do with disassembling and transporting the aircraft. Tr. 307:10-308:3. No section in the FARs deals with recovery and disassembly of a downed aircraft. Tr. 308:4-9. Mr. King acknowledged that the word "disassembly" does not appear in the regulations. Tr. 306:10-14.

Later, as the aircraft fuselage sat on the trailer, some people thought they observed a deflection in the wing box. Tr. 209:24-210:3. Ameristar requested the aircraft be taken off the trailer to see if the deflection was temporary or permanent, but Howe and Houston did not

do that. Tr. 401:17-25, 402:12-18. Howe recommended totaling the aircraft. Houston declared the aircraft a constructive total loss and paid Plaintiffs $1,500,000. Tr. 397:15-20.

On May 1, 1998, Ameristar signed the proof of loss, stating "[t]he actual amount of loss, or damage sustained by the Insured" was $1,500,000. Tr. 405:25, 408:2-4. Ex. 1, App.1. Houston's check for $1,500,000 payable to Ameristar Jet Charter, Inc., Tom Wachendorfer Aviation, Inc., Tom Wachendorfer, Jr., Sierra America Corp and Compass Bank of Dallas, Texas, was issued May 5, 1998. 408:15-25; Ex. 5. Compass Bank held a mortgage on the aircraft, and the check was deposited in Ameristar's general operating account and Compass Bank took the money out of the account to satisfy the debt. Tr. 409:7-14, 409:23-410:6.

In accepting Houston's payment of $1,500,000, Ameristar assigned to Houston "all right, interest or things in action against any person or corporation" who may be liable for the loss of the Falcon 20 aircraft. The assignment contained in the Proof of Loss states:

> Now, therefore, in consideration of the aforesaid payment [of $1,500,000], I/we hereby assign, transfer and subrogate to the said Insurance Company, all right, interest, or things in action against any person or corporation, who may be liable or hereafter adjudged liable for this loss, and I/we empower the said Insurance Company to sue, compromise or settle in my/our names(s), to the extent of the money aforesaid.

Ex. 1; L.F. 643, App. A-1.

Plaintiffs claimed Dodson failed to comply with FAA regulations and with the manufacturer's maintenance manual and caused Houston to declare the aircraft a constructive total loss because of the appearance of a deflection in the wingbox. Plaintiff claimed the

Falcon 20 was worth $1,800,000 in April, 1998, and that Dodson's negligent handling of the aircraft caused Plaintiffs to lose $300,000 in the value of the aircraft plus the loss of use of the aircraft from May, 1998 to August, 1999. Ameristar increased the number of Falcon jets in service from five in May, 1998 to eight in September, 1998, nine in December 1998, eleven in April, 1999 and twelve in May, 1999 (Exs. 135, 136, 137, and 138; App. A-6 to A-9). Only with the placement into service by Ameristar of a thirteenth Falcon in August, 1999 did its President testify that it had replaced the one that landed off-airport in April, 1998. Tr. 334:18-23. Plaintiffs paid approximately $2,100,000 for the Falcon placed in service in August, 1999, $1,732,000 for the aircraft and $365,000 for installation of a cargo door. Tr. 334:18-336:4.

Dodson claimed it did not damage the aircraft, and that in retrieving and transporting the aircraft it did not violate Federal Aviation Regulations or depart from a standard of care set out in the manufacturer's maintenance manual because the activity of retrieving and transporting an aircraft does not constitute maintenance under the regulations. Tr. 539:13-24, 540:23-541:6. J.R. Dodson testified that there was nothing unusual that deviated from generally accepted practice in the industry in the way the fuselage or wings were transported or secured. Tr. 538:2-21, 548:15-19, 549:6-7.

Houston's adjuster solicited salvage bids for the aircraft in April, 1998. Dodson bought the aircraft from Houston "as is, where is," for $705,000, with waiver of retrieval and rental charges of about $15,000. Tr. 438:1-10, 552:14-17, 553:2-8; Ex. 12. Ameristar had bid $410,000 for the aircraft. Tr. 437:21-23; Ex. 11. Keith Brown of Howe told Ameristar it was not the high bidder and offered Ameristar an opportunity to re-bid if it wanted to, but it did not. Tr. 983:20-984:16.

When Dodson removed the aircraft fuselage from the trailer, the apparent deflection in the wingbox popped back into shape. Tr. 834:6-13, 834:18-23. Dodson completely reassembled the aircraft using the Falcon 20 maintenance manuals. Tr. 572:15-20. It took approximately six to eight weeks to repair the aircraft. Tr. 564:23-565:3, 638:22-24. Dodson put about $100,000 into the aircraft to repair it, including reupholstering the pilot and copilot's seats and painting the aircraft. Tr. 638:14-18, 641:11-16; Ex. 123. Repairs were completed in early July, 1998. Tr. 577:25-578:2.

Dodson had nondestructive testing on the aircraft performed by Bonded Inspections. Tr. 567:11-24. Bonded Inspections performed eddy current and ultrasonic testing of the wing attach flange and the fuselage attach flange, the main landing gear and their support areas and the center box and wing to fuselage attach areas, and submitted reports dated May 8 and May 13, 1998. Tr. 576:25-577:24, 759:18-760:1; Exs. 7, 8 and 9. Eric Shaw of Bonded Inspections testified they found no defects and no evidence of cracks, fissures, or deformity. Tr. 298:4-10, 587:22-588:7, 765:3-8; 769:24-770:2.

The manufacturer of the aircraft, Dassault Falcon Jet, assigned its Aircraft Structural Engineer, Raymond Gaillard, to measure the aircraft (Tr. 793:14-21, 845:11, 17; Ex. 60), the results of which were reported on June 15, 1998. Tr. 570:2-24, 800:16-20; Ex. 14. Mr. Gaillard measured the wings, horizontal stabilizer, fuselage and tail section. Tr. 802:1-4, 803:1-4, 903:23-25. He did not find any twisting or bending or deformation in the fuselage. Tr. 703:4-18, 803:3-11. It was all within acceptable tolerances. Tr. 803:12-16. Mr. Gaillard's report concludes that the dimensions of the aircraft structure, wing, fuselage and empanage, are satisfactory. Tr. 587:10-21; 806:15-24; Exs. 14, 60. His report is in evidence.

Tr. 570:11-21; Ex. 14.

Mr. Gaillard's report reflects his measurements of 23 points on the aircraft's wings and sixteen points on the aircraft's tail plane relative to an optical site plane Ex. 14, pp. 2-3. Mr. Gaillard found less than eighteen hundredths of an inch asymmetry between the measurement from the nose to the wingtip of the aircraft (438.36 inches on the left versus 438.18 inches on the right). Ex. 14, p. 4. The measurement from wingtip to tail plane points was three tenths of an inch greater on the right than the left. Ex. 14, p. 4. Mr. Gaillard testified that after hundreds of hours of operation a fuselage droops slightly and turns slightly to the left, the side the door is on, and he sometimes finds differences of seven to 10 millimeters, but on this airplane he found a difference of only two millimeters, much better than the average. Tr. 805:10-806:3. Jim Sparks had said there was a one inch deflection in the wingbox; Mr. Gaillard's calculations were that there was a 1/3-inch temporary deflection in the wingbox. Tr. 816:13-817:14. Mr. Gaillard testified that the metals used in the Falcon 20 aircraft have elastic properties, and that it is accepted to have a deflection in a piece and when you stop applying force it goes back into its original position. Tr. 812:5-814:11. There was no evidence of permanent deformation in this aircraft. Tr. 814:12-25, 819:6-21. After the aircraft was reassembled, Charles LaMont, an A&P (aircraft and power plant) certified mechanic who worked for Dodson and for TWA/American (Tr. 563:19-22), inspected the aircraft and found it to be airworthy. Tr. 574:4-7; Ex. 60.

Dodson offered the aircraft to Ameristar in early May or June, 1998. Tr. 578:17-21. Dodson offered the repaired aircraft to Ameristar with new paint and fresh inspections for $1,500,000, subject to their inspection. Tr. 440:7-11, 581:15-18. Ameristar did not accept

the proposal nor conduct a prepurchase inspection. Tr. 440:10-11, 445:17-446:3, 582:3-8, 667:1-13. J.R. Dodson testified that in July, 1998, if he had all the logbooks for the aircraft, it would have been worth $1,800,000 (Tr. 583:9-15), but it was worth less than $900,000 without any of the records. Tr. 583:16-24. He testified the aircraft was worth $1,600,000 with Ameristar's records. Tr. 584:3-10.

Ameristar offered Dodson $950,000 for the aircraft (Tr. 440:4-6, 584:13-16) but by that time Dodson had learned of the existence of computer records regarding the aircraft, with which the aircraft was worth $1,600,000. Tr. 584:17-25.

On August 3, 1998, Dodson accepted Smith Air's offer of $1,400,000.00 plus a Learjet 24 aircraft for the Falcon 20. Ex. 18. Dodson entered a Purchase Agreement dated September 10, 1998 with Smith Air to sell the Falcon 20 for $1,400,000 plus a Learjet 24 valued at $250,000. Tr. 443:7-11, 591:4-9, 591:17-20, 594:21-25, 656-657; Exs. 28 and 29. Everett Mastin inspected the aircraft for Smith Air, and found ordinary wear and tear and operation maintenance issues. Tr. 854:25-855:3, 857:9-883:18; Ex. 87. J.R. Dodson told Smith Air about the temporary bending of the fuselage as it sat on the trailer. Tr. 656:25-657:6. Mastin found no deformation in the fuselage. Tr. 883:16-18. He concluded the aircraft was in pretty good condition and was a good purchase for Smith Air. Tr. 913:17-22.

Mr. Wachendorfer, owner and President of Ameristar and of Sierra, testified the Falcon aircraft was worth $1,800,000 when Sierra bought it for $1,412,500 and insured it for $1,500,000. Tr. 330:2-11. Mr. Wachendorfer also testified concerning the lost profit portion of Plaintiffs' claimed damages. Tr. 339-363. Ameristar uses airplanes to ship cargo, and charges its clients a fee based on the distance flown. Tr. 338:22-339:2. Mr. Wachendorfer

testified when Ameristar loses an aircraft, that causes it to lose revenue. Tr. 339:6-8. He testified Ameristar had nine other Falcons in its fleet at the time of the off-airport landing. Tr. 339:9-13. The other airplanes could not pick up the slack because they have their own trips, and aircraft positioning is everything. Tr. 339:14-21. Ameristar carries just-in-time parts, and, like a taxicab, its airplanes will be hired if they are close to where the parts to be shipped are located. Tr. 339:24-340:24.

Mr. Wachendorfer testified that he had calculated the amount of money lost from the unavailability of the aircraft as a little over $2.5 million. Tr. 341:24-342:3; 362:3-14; Ex. 134; App. A-5. Although Ameristar had business records regarding revenues and expenses of its business, including audited financial statements (Tr. 373:10-27), none of those records were introduced into evidence. Instead, Plaintiffs introduced Exs. 134, 135, 136, 137 and 138 (App. A-5, A-6, A-7, A-8 and A-9), each of which included numbers and summaries of business data that came from such business records. Tr. 342:16-25; 343:17-23, 345:23-25, 351:21-23, 366:9-21.

Exhibit 134 contained Mr. Wachendorfer's lost profit calculation. Tr. 342:12-15, 344:6-9. The calculation was based on determining the revenue from other aircraft in use after Dodson recovered and transported the Falcon 20 by calculating the average revenue per flight hour on aircraft flown from April 30, 1998 through August 6, 1999 (the "hourly rate") (Tr. 344:14-345:6), multiplying that hourly rate by the total of the average hours per month per aircraft that were flown from April 30, 1998 through August 6, 1999 (Ex. 134; App. A-5), to generate a gross revenue figure of $3,585,907.85. Tr. 349:16-21; Ex. 134; App. A-5. From this gross revenue figure, Mr. Wachendorfer subtracted variable expenses only of fuel and

airplane and engine maintenance (Tr. 354:16-19; 356:11-22, 357:16-24; Ex. 134; App. A-5), but he did not subtract what he characterized as "fixed" or "overhead" expenses (Ex. 355:3-11; Ex. 134; App. A-5):

> Q When you were calculating your lost profit, did you subtract from the gross revenue both fixed expenses and variable expenses, or only fixed or only variable?
>
> A Just variable expenses.
>
> Q You only subtracted variable expenses?
>
> A That's correct.
>
> Q How come you didn't subtract any fixed expenses?
>
> A Because I'd have this overhead anyway.

Tr. 355:3-11. However, Mr. Wachendorfer explained further what he did not deduct, and variable expenses as well as fixed expenses were among those things not deducted, including: rental (Tr. 355:16-18); advertising and telephone (Tr. 355:20); hangar rental (Tr. 355:21-22); the cost of insurance for this particular aircraft (Tr. 450:20-22, 451:11-19); the salary of a pilot and a co-pilot to fly this airplane (Tr. 451:20-22); health benefits, workers compensation insurance, taxes, training expenses paid to pilots and co-pilots for this airplane (Tr. 453:2-5); pilot training (Tr. 453:16-22); debt payments or interest on this airplane (Tr. 454:3-7); and depreciation on any capital assets including the specific airplane (Tr. 454:17-20).

To calculate the variable costs of fuel and maintenance which he did deduct, Mr. Wachendorfer determined the fuel expense by first calculating the average duration per flight leg to be 1.4 hours, then dividing the number of hours flown April 30, 1998 through August 6,

1999 by the number of flight legs. Tr. 348:8-13; Ex. 135; App. A-6. For example, aircraft N204TW flew 131.8 hours in April, 1998 in 79 legs (Ex. 135; App. A-6), for an average of 1.6 hours average leg time for that aircraft. Tr. 348:8-10; Ex. 135; App. A-6 (1.67 hours). The overall average flight leg time for the fleet from April 30, 1998 through August 6, 1999, was 1.4 hours. Tr. 359:7-10. Then, based on Mr. Wachendorfer's testimony that a Falcon burns 415 gallons of fuel the first hour and 267 gallons per hour thereafter, Tr. 359:11-14, he calculated the average fuel used per hour to be 372.85 gallons {[415 x 1 + 267 x 0.4]/1.4 = (415 + 107)/1.4 = 372.85)}. Tr. 360:1-12; Ex. 134, n. 6; App. A-5. At 85 cents per gallon, Mr. Wachendorfer testified the average hourly fuel cost from April 30, 1998 through August 6, 1999 was $316.92. Tr. 360:13-19. He calculated airframe maintenance expense of approximately $200 per hour and engine maintenance of $110 per hour ($55 each for two engines). Tr. 361:9-362:1; Ex. 134 n. 6; App. A-5.

Mr. Wachendorfer then subtracted the $626.92 per hour in variable expenses for fuel and maintenance from the gross revenue per hour of $2,195.77 from April 30, 1998 through August 6, 1999, to calculate profit per hour of $1,568.85. Tr. 362:3-10; Ex. 134; App. A-5. Multiplying that figure times the total hours from April 30, 1998 through August 6, 1999 that represented the average hours flown by a Falcon in Ameristar's fleet (1633.1 hours) equals $2,562,088.94. Tr. 362:11-14; Ex. 134; App. A-5.

Mr. Wachendorfer's calculations rested on multiplying an hourly rate of revenue by a number representing average flight hours per month per aircraft. Ex. 134; App. A-5. However, Mr. Wachendorfer used two different and inconsistent sources of information regarding hours of flight in deriving the hourly rate of revenue and the average flight hours per month. Exs. 135

and 136 reported different flight hours for the same aircraft in the same months as reported in Exs. 137 and 138. Mr. Wachendorfer's calculations of the hourly revenue rates were based on the revenue amounts set forth in Exs. 135 and 136 divided by the hours of use reported for each aircraft in each month listed in Exs. 135 and 136. See Ex. 134, footnote 1; App. A-5.

In contrast, Mr. Wachendorfer's calculations of the average number of flight hours per month per aircraft were based on the hours of use for each aircraft in each month listed in the Flight Utilization Summary charts, Exs. 137 and 138. See Ex. 134, footnote 2; App. A-5. The hours of use reported for each aircraft in each month reported in Exs. 135 and 136, however, did not match the hours of use for the same aircraft in the same month reported in Exs. 137 and 138. The following differences for hours of use of aircraft in 1998 are reflected in comparing Ex. 135 (App. A-6) to Ex. 137 (App. A-8):

- Exhibit 135 reports 150.6 hours of use of aircraft N165TW in September, 1998, but Exhibit 137 reports 154.9 hours of use of aircraft N165TW in September, 1998.
- Exhibit 135 reports 116.1 hours of use of aircraft N165TW in October, 1998, but Exhibit 137 reports 111.8 hours of use of aircraft N165TW in October, 1998.
- Exhibit 135 reports 83.3 hours of use of aircraft N165TW in November, 1998, but Exhibit 137 reports 84.8 hours of use of aircraft N165TW in November, 1998.
- Exhibit 135 reports 102.2 hours of use of aircraft N165TW in December, 1998, but Exhibit 137 reports 99.7 hours of use of aircraft N165TW in December, 1998.
- Exhibit 135 reports 101.6 hours of use of aircraft N204TW in February, 1998, but Exhibit 137 reports 102.1 hours of use of aircraft N204TW in February, 1998.
- Exhibit 135 reports 136.9 hours of use of aircraft N204TW in May, 1998, but Exhibit

137 reports 128.5 hours of use of aircraft N204TW in May, 1998.

- Exhibit 135 reports 100.5 hours of use of aircraft N221TW in January, 1998, but Exhibit 137 reports 109.0 hours of use of aircraft N221TW in January, 1998.
- Exhibit 135 reports 117.4 hours of use of aircraft N221TW in February, 1998, but Exhibit 137 reports 113.0 hours of use of aircraft N221TW in February, 1998.
- Exhibit 135 reports 115.2 hours of use of aircraft N221TW in March, 1998, but Exhibit 137 reports 112.2 hours of use of aircraft N221TW in March, 1998.
- Exhibit 135 reports 126.4 hours of use of aircraft N221TW in May, 1998, but Exhibit 137 reports 127.0 hours of use of aircraft N221TW in May, 1998.
- Exhibit 135 reports 16.0 hours of use of aircraft N232TW in September, 1998, but Exhibit 137 reports 14.6 hours of use of aircraft N232TW in September, 1998.
- Exhibit 135 reports 203.5 hours of use of aircraft N240TW in September, 1998, but Exhibit 137 reports 207.5 hours of use of aircraft N240TW in September, 1998.
- Exhibit 135 reports 131.4 hours of use of aircraft N240TW in December, 1998, but Exhibit 137 reports 124.1 hours of use of aircraft N240TW in December, 1998.
- Exhibit 135 reports 117.2 hours of use of aircraft N285TW in February, 1998, but Exhibit 137 reports 118.4 hours of use of aircraft N285TW in February, 1998.
- Exhibit 135 reports 123.0 hours of use of aircraft N285TW in March, 1998, but Exhibit 137 reports 128.3 hours of use of aircraft N285TW in March, 1998.
- Exhibit 135 reports 140.9 hours of use of aircraft N285TW in September, 1998, but Exhibit 137 reports 148.6 hours of use of aircraft N285TW in September, 1998.
- Exhibit 135 reports 88.5 hours of use of aircraft N295TW in September, 1998, but

Exhibit 137 reports 83.6 hours of use of aircraft N295TW in September, 1998.

- Exhibit 135 reports 102.0 hours of use of aircraft N295TW in October, 1998, but Exhibit 137 reports 102.7 hours of use of aircraft N295TW in October, 1998.
- Exhibit 135 reports 90.3 hours of use of aircraft N699TW in January, 1998, but Exhibit 137 reports 90.8 hours of use of aircraft N699TW in January, 1998.
- Exhibit 135 reports 65.1 hours of use of aircraft N699TW in February, 1998, but Exhibit 137 reports 65.8 hours of use of aircraft N699TW in February, 1998.
- Exhibit 135 reports 144.8 hours of use of aircraft N699TW in March, 1998, but Exhibit 137 reports 146.4 hours of use of aircraft N699TW in March, 1998.
- Exhibit 135 reports 173.4 hours of use of aircraft N699TW in September, 1998, but Exhibit 137 reports 182.0 hours of use of aircraft N699TW in September, 1998.
- Exhibit 135 reports 12.1 hours of use of aircraft N977TW in May, 1998, but Exhibit 137 reports 14.1 hours of use of aircraft N977TW in May, 1998.

Comparison of Ex. 136 (App. A-7) to Ex. 138 (App. A-9) reveals the following entries in which Ex. 136 reports a number of hours of use of a specific aircraft in a specific month in 1999 that is different than the number reported in Ex. 138 as the hours of use for the same aircraft in the same month:

- Exhibit 136 reports hours of use of aircraft N148TW in April, May, June and July, 1999, of 70.4, 146.6, 196.8, and 85.8, respectively, but Exhibit 138 reports hours of use of aircraft N148TW in the same months of 78.2, 148.9, 192.3 and 90.3, respectively.
- Exhibit 136 reports hours of use of aircraft N158TW in March, April, May, June and

July, 1999 of 0, 16.1, 104.2, 148.9 and 24.2, respectively, but Exhibit 138 reports hours of use of aircraft N158TW in the same months as 2.4, 19.6, 105.7, 145.4 and 29.3, respectively.

- Exhibit 136 reports hours of use of aircraft N165TW in January, April, May, June and July, 1999 of 23.6, 38.4, 129.8, 184.1 and 79.4, respectively, but Exhibit 138 reports hours of use of aircraft N165TW in the same months as 40.5, 39.6, 132.3, 186.7 and 78.2, respectively.
- Exhibit 136 reports hours of use of aircraft N204TW in May, June and August, 1999 of 140.6, 190.8 and 130, respectively, but Exhibit 138 reports hours of use of aircraft N204TW in the same months as 142.5, 191 and 132.7, respectively.
- Exhibit 136 reports hours of use of aircraft N221TW in January, February, March, May and June, 1999 of 78.3, 83.9, 81.1, 115.3 and 165.6, respectively, but Exhibit 138 reports hours of use of aircraft N221TW in the same months as 88.5, 87.4, 84.8, 119.3 and 172.1, respectively.
- Exhibit 136 reports hours of use of aircraft N223TW in May and July, 1999 of 4.2 and 49.1, respectively, but Exhibit 138 reports hours of use of aircraft N223TW in the same months as 5.7 and 52.2, respectively.
- Exhibit 136 reports hours of use of aircraft N232TW in January, February, March, April, May, June and July, 1999 of 58.4, 29.1, 119.3, 138.5, 138.6, 174.8 and 84.7, respectively, but Exhibit 138 reports hours of use of aircraft N232TW in the same months as 62.8, 33.5, 115.4, 131, 147.6, 170.3 and 90.7, respectively.
- Exhibit 136 reports 165.3 hours of use of aircraft N240TW in June, 1999, but Exhibit

138 reports 166.3 hours of use of aircraft N240TW in the same month.

- Exhibit 136 reports hours of use of aircraft N285TW in July and August, 1999 of 105.6 and 120.8, respectively, but Exhibit 138 reports hours of use of aircraft N285TW in the same months as 91.6 and 137.5, respectively.
- Exhibit 136 reports hours of use of aircraft N295TW in April and May, 1999 of 62.1 and 156.8, respectively, but Exhibit 138 reports hours of use of aircraft N295TW in the same months as 59.9 and 158.0, respectively.
- Exhibit 136 reports hours of use of aircraft N314TW in July and August, 1999 of 0 and 148.1, respectively, but Exhibit 138 reports hours of use of aircraft N314TW in the same months as 5.6 and 151.4, respectively.
- Exhibit 136 reports hours of use of aircraft N699TW in February, April, May, June, July and August, 1999 of 62.4, 124.1, 29.5, 110.1, 84.2 and 181.6, respectively, but Exhibit 138 reports hours of use of aircraft N699TW in the same months as 65.6, 122.6, 38.2, 109.3, 81.2 and 185.2, respectively.
- Exhibit 136 reports hours of use of aircraft N977TW in March, April, May and June, 1999 of 78.1, 69.7, 116.2 and 161.1, respectively, but Exhibit 138 reports hours of use of aircraft N977TW in the same months as 73.6, 98.1, 118.0 and 165.5, respectively.

Variances of up to 28.4 hours of use (as in the case of aircraft 977TW in April, 1999) between Ex. 136 (App. A-7) and Ex. 138 (App. A-9) affect the calculation of hours per month per aircraft, which in turn is multiplied by the claimed profit per hour of $1,568.85. Ex. 134. Actual business records to show the actual hours of use of the aircraft, or permit a determination of which numbers reported in Ex. 135 through 138 were accurate, were not

introduced.

Plaintiff did not introduce any business records or other documentary evidence regarding Mr. Wachendorfer's estimate of airplane fuel usage of 415 gallons in the first hour of flight or 267 gallons in the second hour of flight, or his statement that airframe maintenance averaged $200 per flight hour, or that engine maintenance averaged $55 per flight hour per engine. Plaintiff introduced no documents regarding actual expenses at any time, either before or after Dodson's work.

Comparison of projected additional flight hours in Plaintiffs' Ex. 134 to actual hours as reported in Exs. 135 and 136 shows that Plaintiffs' damage calculation projected that if Plaintiffs had had an additional Falcon 20 airplane in May, 1998, they would have had 24.03% higher revenue and profit (122.1 hours more than the 508.1 hours reported in Ex. 135); that in June, 1998, they would have had 20.89% more revenue and profit (118.9 hours more than 569.2 hours reported in Ex. 135); that in July, 1998, they would have had 20.01% more revenue and profit (59.1 hours more than 295.3 hours reported in Ex. 135); that in August, 1998, they would have had 16.67% more revenue and profit (130.3 hours more than 781.5 hours reported in Ex. 135); that in September, 1998, they would have had 14.24% more revenue and profit (159.4 hours more than 1111.9 hours reported in Ex. 135); that in October, 1998, they would have had 12.45% more revenue and profit (112.8 hours more than 906.3 hours reported in Ex. 135); that in November, 1998, they would have had 12.52% more revenue and profit (116.2 more than 928.1 hours reported in Ex. 135); that in December, 1998, they would have had 10.99% more revenue and profit (101.5 hours more than 923.5 hours reported in Ex. 135); that in January, 1999, they would have had 13.21% more revenue and profit (73.7

hours more than 557.8 hours reported in Ex. 136); that in February, 1999, they would have had 11.36% more revenue and profit (58.4 hours more than 514.3 hours reported in Ex. 136); that in March, 1999, they would have had 11.05% more revenue and profit (91.5 hours more than 827.9 hours reported in Ex. 136); that in April, 1999, they would have had 9.40% more revenue and profit (82.0 hours more than 872.2 hours reported in Ex. 136); that in May, 1999, they would have had 9.93% more revenue and profit (138.1 hours more than 1390.1 hours reported in Ex. 136); that in June, 1999, they would have had 8.34% more revenue and profit (159.7 hours more than 1914.9 hours reported in Ex. 136); that in July, 1999, they would have had 8.81% more revenue and profit (83.5 hours more than 947.8 hours reported in Ex. 136); and that in August, 1999, they would have had 1.35% more revenue and profit (22.5 hours more than 1666.6 hours reported in Ex. 136). Exs. 134, 135 and 136.

Plaintiffs' financial statements are audited by Jackson Rhodes, a Certified Public Accounting firm, and have been for several years, including at the time of the incident in April, 1998. Tr. 373:10-22. Plaintiffs did not introduce any audited financial statements. Plaintiffs did not introduce any evidence of Ameristar's or Sierra's actual revenues or expenses for any time prior to January, 1998. All of the numbers on which plaintiffs relied for the projection of claimed lost profits were from April, 1998, forward, not for any period prior to the time Dodson retrieved the aircraft and transported it from the levee.

The Court excluded Defendant's evidence of the Federal Aviation Regulation definition of "maintenance," ruling that the federal regulation is "hearsay," and the Court refused to take judicial notice of it. Tr. 532:16-21, 534:3-5, 534:6-15; Ex. 85. J.R. Dodson testified that Exhibit 85 was a copy of the Federal Aviation Regulation that sets out the definition of

maintenance. Tr. 532:11-14. The Court sustained Plaintiffs' objection to admission of Exhibit 85, an unofficial reprint of the regulations, on the ground that it was hearsay, in the following passage:

> MR. BENNETT: Judge, it would be our position that this is admissible as a federal or a government publication or a portion of the federal FARs that relate to the definition of maintenance.
>
> THE COURT: Do you all have an agreement on the document itself?
>
> MR. ILLMER: No. I've never even seen it. You didn't give us Defendant's Exhibit 85.
>
> MR. BENNETT: This is the same FAR that his FAA experts testified with regard to.
>
> MR. ILLMER: And you notice I didn't--
>
> THE COURT: Did he refer to that?
>
> MR. ILLMER: Yes. You notice I didn't introduce it because it was hearsay; in addition, it's lacking foundation.
>
> You can't put it in front of him, ask him to read it and then say, "Are you familiar with it".
>
> THE COURT: He's correct. If he knows the definition he can use that to refresh his memory, if it's vague, but he can also testify to what the definition is, but that regulation, in and of itself is, in fact, hearsay and you can't admit it.
>
> MR. BENNETT: Judge, I would respectfully submit that the court can take judicial notice of this document and allow it to be introduced.

> THE COURT: I can if you have an agreement with opposing counsel that this is an authenticated copy of the document. But if you haven't done that, then I can't do that without his agreement.

Tr. 533:1-534:15.

The case was submitted to the jury on instructions permitting a finding of negligence against Dodson if the jury believed that Dodson failed to follow the maintenance manual or failed to comply with the FAA rules or regulations in the disassembly, loading and transportation of the aircraft. L.F. 680, Instruction No. 7; App. A-13.

The Court refused to give a contributory negligence instruction. See Dodson's Written Request for Contributory Negligence Instruction and Suggestions in Support Thereof. L.F. 644-650, 650, 664, 830; Tr. 963:10-25, 996:6-19. The Court refused to submit two packages, with property damage to be submitted on a comparative fault instruction and economic loss to be submitted on a contributory negligence instruction. Tr. 996:20-997:9.

Over Defendant's objection, the Court included in the mitigation of damages instruction, Instruction No. 9, L.F. 682, App. A-15, the language "if Plaintiffs reasonably should have done so" on each specification of Plaintiffs' conduct, which deviates from MAI. Tr. 987:4-988:16. The phrase "if Plaintiffs reasonably should have done so" was also included in each specification of Plaintiffs' negligence in the comparative fault instruction, Instruction No. 8, L.F. 681, App. A-14.

The Court refused to give Dodson's requested comparative fault instruction, which called for the jury to consider whether Plaintiffs' failure to remove the aircraft from the trailer or inspect it, or to purchase the aircraft barred or reduced recovery. Compare L.F. 661, 832

to Instruction No. 8, L.F. 681. The Court also refused to give Dodson's requested mitigation of damages instruction, which called for the jury to consider whether Plaintiffs' failure to purchase or rent an aircraft while the aircraft was being repaired or to inspect the aircraft constituted a failure to mitigate damages. Compare L.F. 669, 834 to Instruction No. 9, L.F. 682.

In closing argument, Plaintiffs' counsel repeatedly asked the jury to put themselves "in plaintiffs' position" in considering the causation, comparative negligence and mitigation of damages issues. Tr. 1015:7-11; 1066:4-25; 1069:11-15; 1072:16-20. Defendant did not object to such argument. Plaintiffs argued against the idea that Plaintiffs "should have bought the airplane back" (Tr. 1014:16-17, 1015:4-6), asking the jury to ask themselves if they were "in Ameristar's position" at that time, "What would you have done?" Tr. 1015:7-11. With respect to Instruction Number 8, permitting the jury to assess fault to Ameristar because it did not remove the aircraft from the trailer to determine whether the distortion in the fuselage was temporary or permanent, Plaintiffs' counsel emphasized the phrase "if plaintiff reasonably should have done so" and said the answer to the question whether Ameristar reasonably should have done so is no, telling the jury "Put yourself in their position." Tr. 1066:4-25. Again, when arguing that the jury should not find Plaintiffs failed to mitigate their damages because Plaintiffs should have bought the aircraft from Dodson for $1,500,000, Plaintiffs' counsel told the jury: "And put yourself in our position at that time." Tr. 1069:11-16. Plaintiffs' counsel repeated the argument:

> You have to ask yourself if you were in Ameristar's position at the time, should you reasonably have purchased the aircraft in order to mitigate your loss? The

answer is no.

Tr. 1072:16-20.

The jury returned a verdict for Plaintiffs, finding total damages of $2,100,000 and finding Plaintiffs 30% at fault and Defendants 70% at fault. Tr. 688. This appeal followed.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND IN ENTERING JUDGMENT FOR PLAINTIFFS AGAINST DODSON BECAUSE ON MAY 18, 1998, PLAINTIFFS ASSIGNED TO HOUSTON CASUALTY COMPANY ALL RIGHT, INTEREST OR THINGS IN ACTION AGAINST ANY PERSON OR CORPORATION WHO MAY BE LIABLE FOR THE LOSS OF THE AIRCRAFT, IN THAT WHERE A CAUSE OF ACTION HAS BEEN ASSIGNED THE ASSIGNOR NO LONGER HAS ANY INTEREST IN THE CAUSE OF ACTION AND CANNOT MAINTAIN IT, AND BY REASON OF PLAINTIFFS' ASSIGNMENT OF THE ENTIRE CLAIM PLAINTIFFS WERE WITHOUT ANY STANDING TO BRING A CLAIM FOR LOSS OF THE AIRCRAFT.

Steele v. Goosen, 329 S.W.2d 703, 711 (Mo. 1959)

Hayes v. Jenkins, 337 S.W.2d 259, 261-262 (Mo.App. 1960)

General Exchange Ins. Corp. v. Young, 357 Mo. 1099, 212 S.W.2d 396, 401 (1948)

II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR PLAINTIFFS AGAINST DODSON INCLUDING AMOUNTS FOR CLAIMED LOST PROFITS BECAUSE THE EVIDENCE FAILED TO ESTABLISH LOST PROFITS WITH REASONABLE CERTAINTY BY PROOF OF ACTUAL FACTS WITH PRESENT DATA FOR A RATIONAL ESTIMATE OF THEIR AMOUNT AND THERE WAS AN ABSENCE OF INDISPENSABLE PROOF OF THE INCOME AND EXPENSES OF THE BUSINESS FOR A REASONABLE ANTERIOR PERIOD AND THE EVIDENCE OF LOST PROFITS WAS INSUFFICIENT AND SPECULATIVE IN THAT THERE WAS NO EVIDENCE OF INCOME AND EXPENSES IN THE PERIOD PRIOR

TO DODSON'S RECOVERY OF THE AIRCRAFT, THERE WERE NO BUSINESS RECORDS PRESENTING ACTUAL DATA REGARDING REVENUE AND EXPENSES INTRODUCED INTO EVIDENCE, AND PLAINTIFFS' EVIDENCE FAILED TO DEDUCT COSTS AND EXPENSES ATTRIBUTABLE TO PLAINTIFFS' CARGO SHIPMENT BUSINESS, INCLUDING DEPRECIATION OF CAPITAL ASSETS USED IN PRODUCING THE INCOME INCLUDING DEPRECIATION OF THE PARTICULAR AIRPLANE, DEBT SERVICE OR INTEREST ON FINANCING THE AIRPLANE, SALARIES AND BENEFITS AND TRAINING FOR THE PILOT AND CO-PILOT TO FLY THE AIRPLANE, PREMIUMS FOR HULL INSURANCE AND LIABILITY INSURANCE ON THE SAME AIRPLANE, AND HANGAR RENTAL FOR PARKING THE AIRPLANE, AS WELL AS OVERHEAD COSTS INCLUDING ADVERTISING, TELEPHONE, SALARIES AND BENEFITS FOR BILLING, ACCOUNTING, CLERICAL AND ADMINISTRATIVE STAFF INVOLVED IN SCHEDULING CARGO SHIPMENTS AND BILLING AND COLLECTING RELATED REVENUE, THE EXPENSE OF OFFICE SPACE, FURNITURE AND EQUIPMENT USED IN GENERATING REVENUES, AND DEPRECIATION OF SUCH CAPITAL ASSETS USED IN GENERATING REVENUES AND INTEREST EXPENSE.

Coonis v. Rogers, 429 S.W.2d 709, 713-14 (Mo. 1968)

Morrow v. Missouri Pac. Ry. Co., 140 Mo.App. 200, 123 S.W. 1034, 1038-41 (1909)

Meridian Enterprises Corp. v. KCBS, Inc., 910 S.W.2d 329, 331-32 (Mo.App. 1995)

III. THE TRIAL COURT ERRED IN REFUSING TO GIVE A CONTRIBUTORY NEGLIGENCE INSTRUCTION REQUESTED BY DEFENDANT OR TO SUBMIT TWO PACKAGES OF INSTRUCTIONS WITH CONTRIBUTORY NEGLIGENCE AS A BAR TO

CLAIMED ECONOMIC LOSS IN THE FORM OF LOST PROFITS AND INSTEAD SUBMITTING COMPARATIVE NEGLIGENCE BECAUSE CONTRIBUTORY NEGLIGENCE IS AN ABSOLUTE DEFENSE TO A CLAIM FOR ONLY ECONOMIC LOSS IN THAT PLAINTIFFS CLAIMED ONLY ECONOMIC LOSS AND THE FAILURE TO SUBMIT CONTRIBUTORY NEGLIGENCE PREJUDICED DEFENDANT BECAUSE THE JURY FOUND PLAINTIFFS WERE 30% AT FAULT AND NEGLIGENT IN CAUSING THEIR CLAIMED ECONOMIC LOSS. IN THAT THE JURY DID FIND CAUSAL FAULT IN PLAINTIFFS, THE TRIAL COURT FURTHER ERRED IN DENYING PLAINTIFFS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND ENTERING JUDGMENT FOR PLAINTIFFS BECAUSE PLAINTIFFS' CONTRIBUTORY NEGLIGENCE IN CAUSING CLAIMED ECONOMIC LOSS BARRED AN AWARD OF DAMAGES AGAINST DEFENDANTS.

Roskowske v. Iron Mountain Forge Corp., 897 S.W.2d 67, 73 (Mo.App. 1995)

Miller v. Ernst & Young, 892 S.W.2d 387, 388 n. 1 (Mo.App. 1995)

Chicago Title Ins. Co. v. Mertens, 878 S.W.2d 899, 902 (Mo.App. 1994)

IV. THE TRIAL COURT ERRED IN ADDING THE WORDS "IF PLAINTIFF REASONABLY SHOULD HAVE DONE SO" TO EACH SPECIFICATION OF PLAINTIFFS' CONDUCT IN THE MITIGATION OF DAMAGES INSTRUCTIONS, INSTRUCTION NO. 9, OVER DEFENDANT'S OBJECTION, BECAUSE THE ADDITIONS DEVIATE FROM MANDATORY MAI FORM AND SUCH DEVIATION IS PRESUMED PREJUDICIAL ERROR AND IN FACT PREJUDICED DEFENDANT, IN THAT INSTRUCTION NO. 9 DIRECTED THE JURY TO FIND PLAINTIFF FAILED TO MITIGATE DAMAGES IF PLAINTIFF FAILED TO

PURCHASE THE AIRCRAFT FROM DEFENDANT FOR $1,500,000 OR FAILED TO PURCHASE THE AIRCRAFT SALVAGE "IF PLAINTIFF REASONABLY SHOULD HAVE DONE SO," WHICH IMPROPERLY REPEATS THE REASONABLENESS REQUIREMENT WHICH IS PROPERLY SUBMITTED IN THE SECOND PARAGRAPH OF THE APPROVED MAI FORM, AND SUCH INSTRUCTION WAS CONFUSING AND A MISSTATEMENT OF THE LAW, AND DEFENDANT WAS THEREBY PREJUDICED IN PART BECAUSE NO SIMILAR QUALIFICATION WAS INSERTED IN THE INSTRUCTION HYPOTHESIZING DEFENDANT'S ALLEGED ACTS OF NEGLIGENCE.

Lay v. P&G Health Care, Inc., 37 S.W.3d 310, 329 (Mo.App. 2000)

Hein v. Oriental Gardens, Inc., 988 S.W.2d 632, 634 (Mo.App. 1999)

Citizens Bank of Appleton City v. Schapeler, 869 S.W.2d 120, 128 (Mo.App. 1993)

V. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND IN ENTERING JUDGMENT FOR PLAINTIFFS AGAINST DODSON BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE AND INSUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT DEFENDANT CAUSED DAMAGE TO THE FALCON 20 AIRCRAFT, CAUSED ANY LOSS IN MARKET VALUE OF THE AIRCRAFT, OR CAUSED AMERISTAR'S CLAIMED LOSS OF PROFIT, IN THAT (1) THE APPARENT DEFLECTION IN THE FUSELAGE WAS NOT PERMANENT BUT POPPED BACK INTO SHAPE WHEN THE AIRCRAFT WAS REMOVED FROM THE TRAILER, (2) WHEN THE MANUFACTURER'S REPRESENTATIVE MEASURED THE AIRCRAFT IT WAS WITHIN TOLERANCES AND WITHOUT EVIDENCE OF PERMANENT DEFORMATION, (3) BONDED INSPECTIONS

FOUND NO DEFECTS WHEN IT PERFORMED EDDY CURRENT AND ULTRASONIC TESTING OF THE WING ATTACH FLANGE, THE FUSELAGE ATTACH FLANGE, THE MAIN LANDING GEAR AND SUPPORT AREAS, AND THE CENTER BOX AND WING TO FUSELAGE ATTACH AREAS, (4) THE AIRCRAFT RESOLD IN AUGUST, 1998 FOR $1,400,000 PLUS A LEAR JET VALUED AT $250,000, (5) PLAINTIFFS WERE PAID $1,500,000 BY HOUSTON CASUALTY COMPANY, AN AMOUNT EQUAL TO ITS CLAIMED LOSS, FOR AN AIRCRAFT SIERRA PURCHASED FOUR MONTHS EARLIER FOR $1,412,500, (6) PLAINTIFFS CHOSE NOT TO BUY THE AIRCRAFT FROM HOUSTON OR TO BUY IT FROM DODSON IN JUNE, 1998 FOR $1,500,000.00 SUCH THAT ANY LOSS OF USE THEREAFTER WAS NOT CAUSED BY DODSON BUT BY PLAINTIFFS' CHOICE.

Joel Bianco Kawasaki Plus v. Meramec Valley Bank, 81 S.W.3d 528, 537 (Mo. 2002)

Nemani v. St. Louis University, 33 S.W.3d 184, 185 (Mo. 2000), cert. denied, 532 U.S. 981, 121 S.Ct. 1623, 149 L.Ed.2d 485 (2001)

Coon v. Dryden, 46 S.W.3d 81, 88 (Mo.App. 2001)

VI. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF THE FEDERAL AVIATION REGULATION DEFINITION OF MAINTENANCE IN EXHIBIT 85, 14 C.F.R. § 1.1, AND IN REFUSING TO TAKE JUDICIAL NOTICE OF THE DEFINITION OF "MAINTENANCE" IN THE FEDERAL AVIATION REGULATIONS IN 14 C.F.R. § 1.1, BECAUSE THE FEDERAL REGULATION IS NOT HEARSAY AND LONG-ESTABLISHED PRECEDENTS HOLD THAT COURTS WILL TAKE JUDICIAL NOTICE OF FEDERAL REGULATIONS, AND THIS ERROR PREJUDICED DEFENDANT DODSON IN THAT THE

JURY INSTRUCTIONS HYPOTHESIZED A VIOLATION OF FEDERAL REGULATIONS AND THE FAILURE TO FOLLOW THE MANUFACTURER'S MAINTENANCE MANUAL IN THE RECOVERY AND TRANSPORTATION OF THE DOWNED AIRCRAFT AS GROUNDS ON WHICH THE JURY WAS PERMITTED TO FIND THAT DEFENDANT WAS NEGLIGENT, AND THE DEFINITION OF "MAINTENANCE" IN THE REGULATION SUPPORTED DEFENDANT'S CONTENTION THAT RECOVERY AND TRANSPORTATION OF A DOWNED AIRCRAFT DOES NOT CONSTITUTE MAINTENANCE AND THAT DEFENDANT NEED NOT FOLLOW THE MANUFACTURER'S MAINTENANCE MANUAL.

Giddens v. Kansas City Southern Ry. Co., 29 S.W.3d 813, 821 (Mo. 2000), cert. denied, 532 U.S. 990, 121 S.Ct. 1644, 149 L.Ed. 502 (2001)

Kawin v. Chrysler Corp., 636 S.W.2d 40, 44 (Mo. 1982)

State v. Middleton, 998 S.W.2d 520, 528 (Mo. 1999), cert. denied, 528 U.S. 1167, 120 S.Ct. 1189, 145 L.Ed.2d 1094 (2000)

VII. THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL, REPRIMANDING PLAINTIFFS' COUNSEL, OR CAUTIONING THE JURY TO DISREGARD PREJUDICIAL STATEMENTS MADE BY PLAINTIFFS' COUNSEL DURING CLOSING ARGUMENT WHEN HE REPEATEDLY ASKED THE JURY TO PUT THEMSELVES IN PLAINTIFFS' POSITION IN CONSIDERING THE CAUSATION, COMPARATIVE NEGLIGENCE AND MITIGATION OF DAMAGES ISSUES, AND ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL AND ENTERING JUDGMENT IN FAVOR OF PLAINTIFFS BY REASON OF PLAINTIFFS' IMPROPER APPEAL TO JURORS IN CLOSING ARGUMENT TO PUT

THEMSELVES IN PLAINTIFFS' POSITION BECAUSE SUCH AN APPEAL IS UNIFORMLY BRANDED AS IMPROPER AND CONSISTENTLY CONDEMNED FOR THE REASON THAT SUCH ARGUMENT ASKS JURORS NOT TO JUDGE THE CASE IMPARTIALLY BUT TO BE NO FAIRER JUDGE OF THE CASE THAN WOULD PLAINTIFF HIMSELF AND AFFIRMS THE ABHORRENT PRINCIPLE THAT ONE MAY PROPERLY SIT IN JUDGMENT ON HIS OWN CASE, AND SUCH ARGUMENT INFLUENCED THE JURY TO DECIDE THE CASE IMPROPERLY WITH BIAS, PASSION AND PREJUDICE AND IN EFFECT TO DISREGARD THE BURDEN OF PROOF INSTRUCTION AND THE INSTRUCTION THAT IN DETERMINING WHETHER OR NOT TO BELIEVE ANY PROPOSITION, THE JURY MUST CONSIDER ONLY THE EVIDENCE AND THE REASONABLE INFERENCES DERIVED FROM THE EVIDENCE.

Faught v. Wesham, 329 S.W.2d 588, 602 (Mo. 1959)

Edwards v. Lacy, 412 S.W.2d 419, 421 (Mo. 1967)

Merritt v. Wilkerson, 360 S.W.2d 283, 287-288 (Mo.App. 1962)

VIII. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL AND REQUEST FOR REMITTITUR BY REASON OF THE EXCESSIVENESS OF THE VERDICT BECAUSE A VERDICT THAT IS SO GROSSLY EXCESSIVE AS TO INDICATE BIAS, PASSION OR PREJUDICE SHOULD BE SET ASIDE, IN THAT THE VERDICT FINDING $2.1 MILLION IN DAMAGES AND ALLOCATING 70% FAULT TO DEFENDANT, ON THE RECORD IN THIS CASE, IS GROSSLY EXCESSIVE FOR THE REASON THAT THE RECORD REFLECTS THAT DODSON DID NOT CAUSE ANY DAMAGE TO THE AIRCRAFT, DID NOT CAUSE ANY DECREASE IN THE MARKET VALUE OF THE

AIRCRAFT, DID NOT CAUSE PLAINTIFFS LOSS OF USE OF THE AIRCRAFT AND THE VERY LARGE AWARD COMPRISING LOST PROFITS IS BASED ON SPECULATION IN THE ABSENCE OF EVIDENCE OF PAST PROFITS, ACTUAL DATA OR DEDUCTION OF OVERHEAD AND OTHER EXPENSES, AND THE VERDICT REFLECTS THAT THE JURY PUT THEMSELVES "IN PLAINTIFFS' POSITION" AS URGED BY COUNSEL FOR PLAINTIFFS, AND EVIDENCES BIAS, PASSION AND PREJUDICE.

Barnett v. La Societe Anonyme Turbomeca France, 963 S.W.2d 639, 656-57 (Mo.App. 1997), cert. denied, 525 U.S. 827, 119 S.Ct. 75, 142 L.Ed.2d 59 (1998)

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND IN ENTERING JUDGMENT FOR PLAINTIFFS AGAINST DODSON BECAUSE ON MAY 18, 1998, PLAINTIFFS ASSIGNED TO HOUSTON CASUALTY COMPANY ALL RIGHT, INTEREST OR THINGS IN ACTION AGAINST ANY PERSON OR CORPORATION WHO MAY BE LIABLE FOR THE LOSS OF THE AIRCRAFT, IN THAT WHERE A CAUSE OF ACTION HAS BEEN ASSIGNED THE ASSIGNOR NO LONGER HAS ANY INTEREST IN THE CAUSE OF ACTION AND CANNOT MAINTAIN IT, AND BY REASON OF PLAINTIFFS' ASSIGNMENT OF THE ENTIRE CLAIM PLAINTIFFS WERE WITHOUT ANY STANDING TO BRING A CLAIM FOR LOSS OF THE AIRCRAFT.

Standard of Review

Motions for directed verdict and judgment notwithstanding the verdict challenge the submissibility of the plaintiff's case. Coon v. Dryden, 46 S.W.3d 81, 88 (Mo.App. 2001); Kinetic Energy Dev. Corp. v. Trigen Energy Corp., 22 S.W.3d 691, 697 (Mo.App. 1999). A case is not to be submitted to the jury unless each fact essential to liability is predicated upon legal and substantial evidence. Washington by Washington v. Barnes Hosp., 897 S.W.2d 611, 615 (Mo. 1995); Coon, 46 S.W.3d at 88. To determine whether the plaintiff has made a submissible case, the appellate court views the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiff. Id. A case will not be withdrawn from the jury unless there is no room for reasonable minds to differ. Id. Here, there is no room for reasonable minds to differ that Plaintiffs assigned the entire cause of action to Houston and

are without standing.

Argument

In the case at bar, Plaintiffs lost their standing to bring a cause of action against Dodson, when they assigned the entire claim and cause of action arising out of the loss of the Falcon 20 aircraft to Houston. The assignment contained in the Proof of Loss states:

> Now, therefore, in consideration of the aforesaid payment [of $1,500,000], I/we hereby assign, transfer and subrogate to the said Insurance Company, all right, interest, or things in action against any person or corporation, who may be liable or hereafter adjudged liable for this loss, and I/we empower the said Insurance Company to sue, compromise or settle in my/our names(s), to the extent of the money aforesaid.

Ex. 1; L.F. 643; App. 1. The words "assign . . . all right, interest or things in action against any person or corporation" are effective to vest both legal and equitable title to the whole claim in the insurer as well as the right to maintain suit against third parties, and to divest Plaintiffs of any right to maintain suit. Steele v. Goosen, 329 S.W.2d 703, 711 (Mo. 1959).

Where a claimant assigns its entire or whole cause of action, the claimant no longer has any interest and cannot maintain suit on the cause of action. Steele, 329 S.W.2d at 711; General Exchange Ins. Corp. v. Young, 357 Mo. 1099, 212 S.W.2d 396, 401 (1948); Hayes v. Jenkins, 337 S.W.2d 259, 261-262 (Mo.App. 1960).

In Steele v. Goosen, 329 S.W.2d 703 (Mo. 1959), plaintiff sought to recover collision damage to an automobile against a party claimed to have caused the damage, and the trial court sustained defendant's motion to dismiss on the ground that plaintiff was not the real party in

interest. When plaintiff was paid an amount by its insurance carrier less than the cost of repairs to the automobile, plaintiff signed a document which stated:

> And in consideration of said payment the insured hereby assign and transfer to the said Company each and all claims, rights and demands against any person, persons, corportion [sic] or property arising from or connected with such loss or damage, and said Company is subrogated in the place of and to the claims and demands of the insured against such person, persons, corporation or property in the premises who may be liable or hereafter adjudged liable for the burning, theft, destruction or damage to said property to the extent of the amount hereby paid.

329 S.W.2d at 711. The Supreme Court affirmed the order of dismissal, holding that the document signed by plaintiff "constituted an assignment to the insurer of plaintiff's entire claim for property damage," even though plaintiff received $50 less than the cost of repairs to the automobile. The Court held it was immaterial that the document limited the insurer's subrogation rights to the extent of the amount paid. Id. at 711-712.

The Steele case is squarely on point, and compels a finding of assignment by Plaintiffs of their entire claim to Houston Casualty Company. The use of the word "assign" in the operative clause is significant because "[t]he word 'assignment' has a comprehensive meaning, and in its most general sense is a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of an estate or right therein." Kroeker v. State Farm Mut. Auto. Ins. Co., 466 S.W.2d 105, 110 (Mo.App. 1971).

The verb "assign" used in the assignment provision in this case is a transitive verb, and

the nature of what is assigned is seen by considering the object of the verb. In Steele, it was "all claims, rights and demands against any person, persons, corportion [sic] or property arising from or connected with such loss or damage." In the case at bar, the object of the verb "assign" is "all right, interest, or things in action against any person or corporation, who may be liable. . . ." More comprehensive, all-inclusive language could not be chosen. Kroeker, 466 S.W.2d at 110.

In this case, Plaintiffs assigned all right, interest and things in action to Houston, explicitly using the word "assign." Plaintiffs did not retain any right to bring this action, but assigned to Houston **all** right against **any** person for the loss. The word "all" is equivalent to the word "every" and "any." The words "any" and "all" are the most comprehensive words in the English language, and admit of no exceptions.[1] The words are all-comprehensive and unambiguous. Plaintiffs assigned to Houston "all" right against "any" person who may be liable for the loss of the aircraft. Here, Plaintiffs unequivocally assigned the entire claim for loss of the aircraft against any person or corporation to Houston. Plaintiffs were thereby

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[1] North v. Hawkinson, 324 S.W.2d 733, 744 (Mo. 1959) ("'Any' and 'all' have been described as the most comprehensive words in the English language." "The term 'any action' and 'all actions' admit of no apparent exceptions."); Knowles v. Moore, 622 S.W.2d 803, 806 (Mo.App. 1981) ("The word 'any' is all comprehensive and is the equivalent of the words 'every' and 'all'."); Strohmeyer v. Southwestern Bell Tel. Co., 396 S.W.2d 1, 5 (Mo.App. 1965) ("The word 'any' has been construed as being all comprehensive and the equivalent of the word 'all'.").

completely divested of the right to maintain this action.

The presence of the word "subrogate" in the assignment clause in addition to the words "assign" and "transfer" does not limit the complete divestiture of the entire claim effected by the assignment language. Missouri cases have long recognized a distinct difference between an assignment of a claim and subrogation to a claim. Keisker v. Farmer, 90 S.W.3d 71, 74 (Mo. 2002); Kroeker v. State Farm Mut. Auto. Ins. Co., 466 S.W.2d 105, 109-110 (Mo.App. 1971); Holt v. Myers, 494 S.W.2d 430, 437 (Mo.App. 1973). By an assignment, the assignee receives legal title to the claim, and the exclusive right to bring suit is vested in the assignee. If the claim has been subrogated, an equitable right passes to the subrogee and the legal right to the claim remains in the subrogor. While subrogation and assignment are distinct, they are not mutually exclusive. In a sense, one contains the other. Subrogation is the transfer of equitable title to a claim in which legal title remains in the original claimant; assignment is the transfer of both legal and equitable title to a claim. Thus, assignment includes everything involved in subrogation–the passage of equitable rights–and in addition involves the passage of legal rights from the assignor to the assignee. As illustrated in the Steele case, where the assignment provision included both an assignment and express provision for subrogation, the same contractual provision can provide for both assignment and subrogation. The use of the word "subrogate" does not negate an assignment or create any ambiguity. Steele, 329 S.W.2d at 711 (plaintiff assigned his entire claim for property damage to the insurer, even though the instrument provided that "said Company is subrogated in the place of and to the claims and demands of the insured against" other persons). The Steele case conclusively refutes Plaintiffs' contention that the use of the word "subrogate" negates assignment of all of the

claims.

The assignment provision in this case is substantially the same as that in Steele, containing two independent clauses,[2] the first of which effects a complete assignment: here, Plaintiffs did "hereby assign, transfer and subrogate to the said Insurance Company, all right,

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[2] Both the assignment provision in this case and the assignment provision in Steele contain two independent clauses. A clause is "a group of words having its own subject and predicate but forming only part of a compound or complex sentence." Webster's Desk Dictionary, p. 101 (1995). The first clause in the assignment provision in this case contains the subject and predicate: "I/we . . . assign, transfer and subrogate to" and the second clause contains the subject and predicate: "I/we . . . empower." Similarly, the assignment provision in Steele contained two independent clauses, the first clause containing the subject and predicate: "the insured . . . assign[s] and transfer[s] to" and the second clause containing the subject and predicate: "said Company is subrogated." The clauses are independent clauses, because the two clauses in each assignment provision can stand by themselves as separate sentences, i.e., supplying a period in place of the comma and the word "and" that join the two clauses produces two separate grammatical sentences. Neither of the two clauses in either assignment provision is a dependent clause, because there is not a subordinating conjunction or dependent word in the clauses that make one of the clauses dependent on the other. The logic of the grammar explains the holding in Steele that a qualifying phrase at the end of one independent clause was "irrelevant" to the scope of the verb assign in the earlier independent clause. The same is true in this case.

interest, or things in action against any person or corporation, who may be liable or hereafter adjudged liable for this loss," just as in Steele the plaintiff did "hereby assign and transfer to the said Company each and all claims, rights and demands against any person, persons, corpration [sic] or property arising from or connected with such loss or damage."

The second independent clause of the assignment paragraph, in this case, as in Steele, separately deals with subrogation rights, to expressly provide for the subrogation that in any event follows by law from the insurer's payment. In this case, Plaintiffs agreed "I/we empower the said Insurance Company to sue, compromise or settle in my/our names(s), to the extent of the money aforesaid;" similarly, in Steele, the plaintiff agreed that "said Company is subrogated in the place of and to the claims and demands of the insured against such person, persons, corporation or property in the premises who may be liable or hereafter adjudged liable for the burning, theft, destruction or damage to said property to the extent of the amount hereby paid." The Steele case construed the limiting phrase "to the extent of the amount hereby paid" appearing at the end of the second independent clause to modify the verb phrase "is subrogated . . . to" in that clause, but not to limit the assignment in the prior clause.

Comparison of the assignment provision in this case to that in Steele demonstrates that they are parallel in structure and substance:

Assignment in this case: Now, therefore, in consideration of the aforesaid payment, I/we hereby assign, transfer and subrogate to the said Insurance Company, all right, interest, or things in action against any person or corporation, who may be liable or hereafter adjudged liable for this loss, and I/we empower the said Insurance Company to sue, compromise or settle in my/our names(s), to the extent of the money aforesaid.	**Steele Assignment:** And in consideration of said payment the insured hereby assign and transfer to the said Company each and all claims, rights and demands against any person, persons, corportion [sic] or property arising from or connected with such loss or damage, and said Company is subrogated in the place of and to the claims and demands of the insured against such person, persons, corporation or property in the premises who may be liable or hereafter adjudged liable for the burning, theft, destruction or damage to said property to the extent of the amount hereby paid.

In Steele, this Court concluded that "[i]t is immaterial to any of the issues here that the document signed by plaintiff limits the insurer's subrogation rights 'to the extent of the amount hereby paid,'" and held that plaintiff had assigned its entire claim to the insurer. Id. at 711-712. In Keisker v. Farmer, 90 S.W.3d 71 (Mo. 2002) (finding ambiguity in policy provision which did not use the word "assign" and allowed insured to waive insurer's rights after loss), the Court recognized that the limit "to the extent of our payment" can appear in an assignment, citing Steele and Hoorman v. White, 349 S.W.2d 379, 380 (Mo.App. 1961). "The key is the context in which the limit appears." 90 S.W.3d at 74. In this case, the context is identical to

that in Steele.

Plaintiffs contend the phrase "to the extent of the money aforesaid" appearing at the end of the second independent clause should be interpreted as modifying the verbs "assign" and "transfer" in the first independent clause of the assignment paragraph. This interpretation requires taking the modifying phrase from the end of the second independent clause of the assignment provision, and treating it as modifying and limiting the verb "assign" in the earlier independent clause. Such a construction was rejected in Steele, and it defies the logic and grammar of the separate clauses.

The Court of Appeals' slip opinion did not follow this Court's direct holding in Steele that the phrase "to the extent of the amount paid" was immaterial to the assignment and did not prevent the assignment from divesting the assignor of legal and equitable title to the claims. That is, the Court of Appeals accepted Plaintiffs' invitation to treat the phrase at the end of the second independent clause as if it modified the verb in the first independent clause, and did not apply the holding in Steele, to construe the words "to the extent of the money aforesaid" as immaterial to the assignment. The Court of Appeals did so in reliance on the suggestion by Judge Maus in the Missouri Practice treatise that an assignment to the extent of the insurer's payment is a partial assignment. This suggestion echoes Judge Maus' own opinion in Warren v. Kirwan, 598 S.W.2d 598, 600 (Mo.App. 1980) (Maus, J.), in which a single clause contained both the verbs "assigns, transfers, and sets over" and the phrase "to the extent of the payment above made." Any reliance on Warren is misplaced. Warren involved a single clause in which the modifying phrase could be seen to modify the verb "assigns." It is not clear that the Warren case can be reconciled with Steele, and Dodson respectfully submits that the Southern

District's opinion in Warren is simply incorrect to the extent it is inconsistent with Steele. A compelling argument can be made that Warren erroneously found a partial assignment where the language of the clause should have led to a finding of a total assignment. In any event, Warren has no application in the case at bar, because the assignment provision in this case is like that in Steele, both containing two independent clauses in which the assignment clause is not limited, and not a single clause as in Warren. Any effort to distinguish Warren from Steele to explain its holding similarly distinguishes Warren from the case at bar.

Because Plaintiffs assigned to Houston all right, interest and things against any person, Plaintiffs divested themselves of the entire claim and retained no rights or standing in this case.

II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR PLAINTIFFS AGAINST DODSON INCLUDING AMOUNTS FOR CLAIMED LOST PROFITS BECAUSE THE EVIDENCE FAILED TO ESTABLISH LOST PROFITS WITH REASONABLE CERTAINTY BY PROOF OF ACTUAL FACTS WITH PRESENT DATA FOR A RATIONAL ESTIMATE OF THEIR AMOUNT AND THERE WAS AN ABSENCE OF INDISPENSABLE PROOF OF THE INCOME AND EXPENSES OF THE BUSINESS FOR A REASONABLE ANTERIOR PERIOD AND THE EVIDENCE OF LOST PROFITS WAS INSUFFICIENT AND SPECULATIVE IN THAT THERE WAS NO EVIDENCE OF INCOME AND EXPENSES IN THE PERIOD PRIOR TO DODSON'S RECOVERY OF THE AIRCRAFT, THERE WERE NO BUSINESS RECORDS PRESENTING ACTUAL DATA REGARDING REVENUE AND EXPENSES INTRODUCED INTO EVIDENCE, AND PLAINTIFFS' EVIDENCE FAILED TO DEDUCT COSTS AND EXPENSES ATTRIBUTABLE TO PLAINTIFFS' CARGO SHIPMENT BUSINESS,

INCLUDING DEPRECIATION OF CAPITAL ASSETS USED IN PRODUCING THE INCOME INCLUDING DEPRECIATION OF THE PARTICULAR AIRPLANE, DEBT SERVICE OR INTEREST ON FINANCING THE AIRPLANE, SALARIES AND BENEFITS AND TRAINING FOR THE PILOT AND CO-PILOT TO FLY THE AIRPLANE, PREMIUMS FOR HULL INSURANCE AND LIABILITY INSURANCE ON THE SAME AIRPLANE, AND HANGAR RENTAL FOR PARKING THE AIRPLANE, AS WELL AS OVERHEAD COSTS INCLUDING ADVERTISING, TELEPHONE, SALARIES AND BENEFITS FOR BILLING, ACCOUNTING, CLERICAL AND ADMINISTRATIVE STAFF INVOLVED IN SCHEDULING CARGO SHIPMENTS AND BILLING AND COLLECTING RELATED REVENUE, THE EXPENSE OF OFFICE SPACE, FURNITURE AND EQUIPMENT USED IN GENERATING REVENUES, AND DEPRECIATION OF SUCH CAPITAL ASSETS USED IN GENERATING REVENUES AND INTEREST EXPENSE.

Standard of Review

The trial court should sustain a defendant's motion for directed verdict or judgment notwithstanding the verdict when the facts in evidence and the reasonable inferences which can be drawn therefrom are so strongly against plaintiff as to leave no room for reasonable minds to differ. Meridian Enterprises Corp. v. KCBS, Inc., 910 S.W.2d 329, 331 (Mo.App. 1995). A case should not be submitted to the jury unless each and every fact essential for liability is predicated on legal and substantial evidence, and the question whether the evidence is substantial is one of law for the court. Id. Where a plaintiff seeks lost profits, but presents no evidence of fixed or variable expenses which would have been attributable to the business, and fails to prove actual facts which present a basis for a rational estimate of damages without

resorting to speculation, supported by the best evidence available, the defendant's motion for directed verdict should be sustained. Id. at 331-332.

Argument

The majority if not all of the damages awarded represents amounts for claimed lost profit.[3] The judgment should be reversed because the evidence is insufficient to support an award of lost profits in any amount, for the reasons that (1) Plaintiffs admittedly failed to deduct a variety of fixed and variable expenses including salaries, benefits, insurance, depreciation, rent, interest, and other costs attributable to generating revenue with this aircraft, in calculating net profit; (2) there is no evidence of income and expenses of Plaintiffs' cargo hauling business for a reasonable prior period which is required and "indispensable" in proving lost profits; and (3) Plaintiffs did not introduce actual business records showing income and expenses for any period and thus failed to present the best available evidence as required to establish loss of profits.

Traditional Rule on Proof of Anticipated Profits

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[3] At least $1,210,00 of the $1,420,000 judgment must be attributed to the claimed loss of profits. Plaintiffs claimed the aircraft was worth $1,800,000 at the time Sierra bought it for $1,415,000 and insured it for $1,500,000. Subtracting the 30% fault allocated to Plaintiffs from $300,000 conceivably awarded as the difference between $1,800,000 and the $1,500,000 received by Plaintiffs from Houston, no more than $210,000 of the judgment could represent claimed lost market value of the aircraft, and at least the remaining $1,210,000 must represent claimed lost profits.

From the earliest decided cases, Missouri courts have uniformly rejected recovery of anticipated profits in cases where such profits are too remote, speculative and dependent on changing circumstances to warrant judgment for their recovery. For example, six years before the venerable decision in Hadley v. Baxendale,[4] in an action to recover payment for labor and materials furnished in building a steamboat hull, this Court rejected defendant's offsetting claim for profits he had failed to realize by reason of two months' delay in plaintiff's delivery of the steamboat hull. Taylor v. Maguire, 12 Mo. 313, 317-20 (1848). As set out below, from Taylor to Morrow v. Missouri Pac. Ry. Co., 140 Mo.App. 200, 123 S.W. 1034 (1909) to Coonis v. Rogers, 429 S.W.2d 709 (Mo. 1968) to Brown v. McIbs, Inc., 722 S.W.2d 337 (Mo.App. 1986) and Meridian Enterprises Corp. v. KCBS, Inc., 910 S.W.2d 329 (Mo.App. 1995)[5] the law of Missouri has remained the same in this regard: anticipated profits of a

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[4] 9 Exch. 341, 15 Eng. Rep. 145 (1854). Hadley is the historic case limiting damages in breach of contract cases to those reasonably contemplated by the parties or the natural consequence of breach. In Hadley, the court held that plaintiff millers were not allowed to recover the loss of several days' profits from the operation of a mill at Glaucester caused by delay in delivery of a repaired crank shaft, where such loss was neither a natural consequence of the breach of the carrier's contract nor communicated to or known by defendants. The court reversed judgment for plaintiff and ordered a new trial, stating that "[t]he Judge ought, therefore, to have told the jury, that upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages."

[5] Coonis v. Rogers, and Meridian were recently cited with approval as expressing the

commercial business are generally too remote, speculative, and dependent on changing circumstances to be recovered, but in the case of an established business, they may be recovered only when made reasonably certain by proof of actual facts with present data for a rational estimate of their amount, and it is indispensable that the proof include the income and expenses of the business for a reasonable anterior period.

In Taylor, the Court reasoned that the claim for lost profits from hiring out the steamboat is very similar to that of a lessee against a lessor whose title to a house failed. The Court stated that a lessee's claim for "indemnity for the loss of custom in a business he may have established whilst residing in the house . . . would be rejected." 12 Mo. at 318. The Court held "[i]t is not easy to imagine a case of speculative damages, if the expected profits of running or hiring out a boat, during the two months of delay in the delivery, would not fall within the designation." Id. The Court held that the rule of damages desired by the defendant "would be a mere calculation of chances," because the jury:

> would have to weigh probabilities in order to arrive at any equitable result. Because the defendant was offered five thousand dollars for the use of a boat, such as he had contracted for, during two months, it will not do to say that he is entitled to the five thousand dollars as the actual loss he has sustained by reason of the breach of contract by plaintiff. There were risks to be encountered in such a bargain, which undoubtedly would have to be considered, in estimating even the probable loss, or rather the failure to make probable gains. The boat may have

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standard of proof for lost profits, in Keisker v. Farmer, 90 S.W.3d 71, 75 (Mo. 2002).

> been burned, or snagged, or sunk; the persons with whom the contract was made may have proved insolvent; or if the solvency of the contractors and the life of the boat were both insured, the insurance company may have proved insolvent. These are merely suggested as possibilities, the value of which must be estimated in undertaking to estimate the actual value of the bargain in cash. It will be seen at one, that the result of such calculations will depend upon the complexion of the jury, and there will be no fixed standard to guide them, no settled rule which they must follow, but everything must be left to the caprice or fancy on the trial of fact.

Id. at 319-310. See, Blanchard v. Ely, 21 Wend. 342, 34 Am.Dec. 250 (N.Y.Sup. 1839) (rejecting claim for loss of profit from steamboat trips by reason of defects in the boat).

In Callaway Min. & Mfg. Co. v. Clark, 32 Mo. 305 (1862), plaintiff sought to recover damages resulting from defendants' attachment and seizure of a steamboat used to transport coal to Jefferson City. The trial court refused to instruct the jury that plaintiff's "measure of damages should be what they may find from the evidence would have been the net earnings of the boat after deducting the cost of running her." 32 Mo. at 309-10. The Court affirmed the judgment, holding that "[t]he jury will not be permitted to speculate as to what might be the probable or expected profits of a boat." Id. at 310.

From these earliest cases, the general rule has been preserved, while an exception for established businesses has evolved.[6] "The general rule as to the recovery of anticipated profits

[6] The history of this rule is traced in Spruce Co. v. Mays, 333 Mo. 582, 62 S.W.2d 824,

of a commercial business is that they are too remote, speculative, and too dependent upon changing circumstances to warrant a judgment for their recovery. . . . They may be recovered only when they are made reasonably certain by proof of actual facts, with present data for a rational estimate of their amount." Coonis v. Rogers, 429 S.W.2d 709, 714 (Mo. 1968); Jack L. Baker Companies v. Pasley Mfg. & Distributing Co., 413 S.W.2d 268, 270 (Mo. 1967); Anderson v. Abernathy, 339 S.W.2d 817, 824 (Mo. 1960); Coonis v. City of Springfield, 319 S.W.2d 523, 528 (Mo. 1958); United Iron Works v. Twin City Ice & Creamery Co., 295 S.W. 109, 113, 317 Mo. 125 (Mo. 1927); Ozark Employment Specialists, Inc. v. Beeman, 80 S.W.3d 882, 897 (Mo.App. 2002); Gesellschaft Fur Geratebau v. GFG America Gas Detection, Ltd., 967 S.W.2d 144, 147 (Mo.App. 1998); Thoroughbred Ford, Inc. v. Ford Motor Co., 908

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828 (1933): "Beginning with the early case of Taylor v. Maguire, 12 Mo. 313, followed by the later case of Callaway Mining & Mfg. Co. v. Clark, 32 Mo. 305, loc. cit. 310, and by Steffen v. Mississippi River & Bonne Terre Railway Co., 156 Mo. 322, 56 S. W. 1125, down to the late case of United Iron Works v. Twin City Ice & Creamery Co., 317 Mo. 125, 295 S. W. 109, this court uniformly has refused to permit a jury to speculate as to what might be probable or expected profits as an element of damages. Reference is made to the United Iron Works case, supra, 317 Mo. loc. cit. 135, et seq., 295 S. W. 109, for a review of the cases on this point. Under the facts and the rulings of those cases, anticipated profits are recoverable only when they are made reasonably certain by proof of actual facts which present data for a rational estimate of such profits. Morrow v. Missouri Pacific R. Co., 140 Mo.App. 200, 123 S. W. 1034, cited with approval in the United Iron Works case, supra."

S.W.2d 719, 735 (Mo.App. 1995); Farris v. Mitchell, 745 S.W.2d 262, 264 (Mo.App. 1988); All Star Amusement, Inc. v. Jones, 727 S.W.2d 930, 931 (Mo.App. 1987); Brown, 722 S.W.2d at 341; Orchard Container Corp. v. Orchard, 601 S.W.2d 299, 305 (Mo.App. 1980); Morrow v. Missouri Pac. Ry. Co., 140 Mo.App. 200, 123 S.W. 1034, 1038 (1909).

In evaluating the sufficiency of evidence to sustain awards of damages for loss of business profits the appellate courts of this state have imposed stringent requirements, refusing to permit speculation as to probable or expected profits, and requiring a substantial basis for such awards. Coonis v. Rogers, 429 S.W.2d at 714; Gesellschaft, 967 S.W.2d at 147. Accord, Coonis v. City of Springfield, 319 S.W.2d at 528 ("this court and our courts of appeals have been strict in their evaluation of the sufficiency of the evidence warranting a recovery of damages for loss of profits"); Red-E-Gas Co. v. Meadows, 360 S.W.2d 236, 241 (Mo.App. 1962); Spruce Co., 62 S.W.2d at 828; Thoroughbred Ford, 908 S.W.2d at 735; Tnemec Co. v. North Kansas City Development Co., 290 S.W.2d 169, 174 (Mo. 1956).

In order for plaintiff to meet its burden of presenting competent proof to make anticipated profits reasonably certain and recoverable, "[i]t is indispensable that this proof include the income and expenses of the business for a reasonable anterior period, with a consequent establishing of the net profits during the previous period." Brown, 722 S.W.2d at 341; Thoroughbred Ford, 908 S.W.2d at 735. Accord, Coonis v. Rogers, 429 S.W.2d at 714-715 ("proof of the income and expenses of the business for a reasonable time anterior to its interruption, with a consequent establishing of the net profits during the previous period, is indispensable"); Anderson, 339 S.W.2d at 824 (same); Gesellschaft, 967 S.W.2d at 147 (competent proof requires facts as to "income and expenses of the business for a reasonable

time anterior" and "[s]uch facts are indispensable"); Meridian, 910 S.W.2d at 331 ("[i]n the case of an established business, it is 'indispensable' for proof of anticipated profits that a plaintiff 'include the income and expenses of the business for a reasonable anterior period, with a consequent establishing of the net profits during the previous period.'"); McGinnis v. Hardgrove, 163 Mo.App. 20, 145 S.W. 512, 513-514 (1912) ("it is held in such cases that proof of the expenses and income of the business for a reasonable time anterior to and during the interruption of the business or facts of equivalent import is indispensable"); Morrow, 123 S.W. at 1039 ("proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption, or facts of equivalent import, and without this indispensable showing and without these facts, there is no rational basis by which a reliable estimate could be made.").

It is well-established that lost profits are not total sales but net profits, after deduction of all costs, charges and expenses. As stated in Morrow, 123 S.W. at 1039:

> In a manufacturing or agricultural business, the word "profits" has a fixed and definite meaning. It means the net earnings, or the excess of returns over expenditures, and relates to any excess which remains after deducting from the returns the operating expenses and depreciation of capital, and also, in a proper case, interest on the capital employed. "Profit," in the ordinary acceptation of the law, is the benefit or advantage remaining after all costs, charges, and expenses have been deducted from the income, because, until then, and while anything remains uncertain, it is impossible to say whether or not there has been a profit.

For this reason, "a plaintiff fails to make a submissible case of damages if plaintiff does not introduce evidence of overhead expenses such as mortgage or rent, utilities, and salaries attributable to the business of producing the income." Skinner v. Thomas, 982 S.W.2d 698, 700 (Mo.App. 1998). Accord, Meridian, 910 S.W.2d at 331 (failure to produce evidence of such expenses as rent or mortgage, utilities, support staff salaries, or other overhead costs prevents plaintiff from making a submissible case); Brown, 722 S.W.2d at 341 ("Employee costs, overhead, rents and other expenses must all be deducted from sales before net profit can be determined."). Calculation of profits requires that "all items" of income and expense be considered. Coonis v. Rogers, 429 S.W.2d at 700; Skinner, 982 S.W.2d at 700; All Star Amusement, Inc. v. Jones, 727 S.W.2d 930, 932 (Mo.App. 1987) ("any actual expenses for repair (parts and outside labor), transportation, insurance, and supplies, along with depreciation on the equipment must enter into the calculation of net profits").

Among other expenses, deduction of depreciation of property used to produce gross revenue is required. In Coonis v. Rogers, the Supreme Court held that the "cost and expense of operation, including depreciation, is a considerable item and in a suit for loss of profits is an essential item in proof of damages." 429 S.W.2d at 714. Accord, Coonis v. City of Springfield, 319 S.W.2d at 528 ("wear and tear on plaintiffs' equipment for the ten months was an item of expense in arriving at plaintiffs' loss of profits"); Morrow, 123 S.W. at 1041 (expenses of operating the business includes depreciation of capital).

Lost profits are generally not recoverable by a start-up business, because it is impossible to present any evidence of profits for a reasonable previous period. Brown, 722 S.W.2d at 341 ("analogous to the 'established business' rule allowing recovery for lost profits,

the individual must present proof that shows what profits are attributable to his efforts for a reasonable previous period.") In Morrow, the Court explained that an established business is an exception to the general rule because such a business:

> can show what its usual and customary earnings have been prior to the interruption of the business, and such average earnings would constitute a standard by which to measure the loss of profits during the period of its enforced idleness. But if the plaintiff at the trial fails to offer any satisfactory evidence to establish what the net profits of his mill and milling business have usually and actually been during any previous period, then his case would fall within the reason and principle of the general rule, and not within the exception, and his expected profits would be merely conjectural and speculative.

123 S.W. at 1039.

Absent evidence of the income and expenses of the business as to which loss of profits is claimed for a reasonable prior period, there is a failure of proof. As stated in McGinnis, 145 S.W. at 514 (insufficient evidence of lost profit in connection with a livery business where plaintiff testified that he did not know what the profits of the business were before he purchased it): "Plaintiff must not only show in such a case his right of recovery, but the elements and facts which compose the measure of his recovery, and not leave the jury to rove without guide or compass through the limitless fields of conjecture and speculation."

In the event of uncertainty, the amount of estimated loss of profits should at least be supported by the best available evidence. Hargis v. Sample, 306 S.W.2d 564, 569 (Mo. 1957); Moss v. Mindlin's, Inc., 301 S.W.2d 761, 773 (Mo. 1956); Gesellschaft, 967 S.W.2d at 147;

Meridian, 910 S.W.2d at 331; Ibarra v. Missouri Poster & Sign Co., Inc., 838 S.W.2d 35, 39 (Mo.App. 1992). In Meridian, it was held that plaintiff failed to produce the best evidence available where it "did not introduce its tax returns or offer testimony of the accountant who prepares the returns," and failed to introduce financial records of income and expenses for a reasonable anterior period. Accord, Skinner, 982 S.W.2d at 700.

The requirement that the best available evidence be introduced to come within the stringent proof requirements in the special context of a claim for lost profits has nothing to do with the "best evidence rule" under which testimonial evidence of a fact may be excluded where the fact does not exist independently of a writing. See Cooley v. Director of Revenue, 896 S.W.2d 468, 470 (Mo. 1995) (oral testimony that arresting officer in DWI case was certified to administer breathalyzer test is admissible independently of documents establishing certification). The issue is the sufficiency of evidence to establish lost profits within the narrow exception for established businesses where evidence of income and expenses for a reasonable time anterior is required, not admissibility. Dodson does not contend that oral testimony regarding Plaintiffs' revenues and aircraft usage charts were not admissible, but that without the existing audited financial statements, tax returns, and business records establishing the actual facts regarding income and expenses, the evidence was not sufficient to meet the strict and stringent requirements for showing lost profits. The evidentiary rule relating to admissibility dealt with in Cooley, which did not involve a lost profits claim, is irrelevant to the rule relating to sufficiency of evidence of lost profits established in Hargis and Moss and

properly applied in Meridian, Skinner, Gesellschaft and Ibarra.[7] Where the evidence is insufficient as a matter of law to support an award for lost profits, the jury may not be permitted to draw its own conclusions regarding the sufficiency of the evidence. To permit an award of lost profits resting solely on a party's opinions regarding amounts of historical profits without introduction of available business records to support the actual data would be

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[7] Cf. Whitman's Candies, Inc. v. Pet Inc., 974 S.W.2d 519, 527 (Mo.App. 1998). The Court in Whitman's Candies failed to recognize the distinction between the best evidence rule relating to admissibility of evidence and the requirement in lost profit cases that appellate review of the sufficiency of the evidence requires consideration of whether the best available evidence to establish net profits was introduced. Whitman's Candies relied on a case dealing with the admissibility issue, Aluminum Products Enterprises, Inc. v. Fuhrmann Tooling and Mfg. Co., 758 S.W.2d 119 (Mo.App. 1988) (Pudlowski, J.), which did not involve a claim for lost profits, as if it answered the distinct question of the sufficiency of evidence of net profits for a reasonable anterior period to support an award of loss of profits. Certainly Judge Pudlowski, who was on the panel and concurred in the Meridian decision did not consider the application in Meridian of the requirement for the best available evidence in lost profits cases to be in any way inconsistent with Judge Pudlowski's discussion of the different issue of admissibility in Aluminum Products. Plaintiffs' showing in this case is insufficient not only because they did not introduce the best evidence available of prior income and expenses, but because they did not even introduce oral testimony to show income and expenses for a reasonable time prior to the off-airport landing, and did not subtract relevant expenses.

to "allow an interested Plaintiff to guess the money out of his adversary's pocket into his own, and make the court ratify the confiscatory process." Morrow, 123 S.W. at 1041.

In this case, Plaintiffs fell short of introducing competent and substantial evidence of lost profit in three ways: (1) they failed to deduct many categories of expenses, both fixed and variable, attributable to the generation of the claimed lost income; (2) they failed to introduce any evidence of income and expenses for a reasonable time anterior, but relied only on revenue charts relating to periods after the off-airport landing of the aircraft, and completely failed to introduce any actual evidence of historic income or expenses in any category (including the fuel and maintenance expenses Plaintiffs did deduct); and (3) they failed to introduce any actual business records and the aircraft usage charts introduced contained numbers that were on their face inconsistent and unreliable.

(1) Plaintiffs failed to deduct costs and expenses.

The evidence Plaintiffs did present was wholly inadequate because Plaintiff did not deduct a variety of categories of expense that the courts have repeatedly held must be deducted to allow a rational determination of lost profits. Plaintiffs deducted only expenses of fuel and airframe and engine maintenance from the claimed lost gross revenues (Tr. 354:16-19; 356:11-22, 357:16-24; Ex. 134; App. A-5). Plaintiffs did not present evidence of the amount of, or deduct, costs and expenses for overhead, employee costs (including salary, health benefits, workers compensation, taxes, training expenses), rents, depreciation, debt service, insurance costs, advertising, telephone and a variety of other expenses attributable to use of an additional airplane, or to the business generally. Tr. 355:3-11, 355:16-22, 450:20-22, 451:11-22, 453:2-5, 453:16-22, 454:3-7, 454:17-20; Ex. 134; App. A-5. As a result,

Plaintiffs never put into evidence the information necessary to determine Plaintiffs' net profits for any time period, before or after the off-airport landing.

Specifically, Plaintiffs did not subtract expenses of rental, Tr. 355:16-18; advertising and telephone, Tr. 355:20; or hangar rental, Tr. 355:21-22. Plaintiffs' president testified regarding hull insurance and liability insurance on aircraft, and testified that it was Plaintiffs' standard practice to buy insurance for liability risk for the airplanes, Tr. 451:2-10. He testified he did not deduct off the cost of insurance for that aircraft, Tr. 450:20-22, and that he did not know the cost of insurance for a Falcon 20. Tr. 450:23-24. Plaintiffs' president testified:

Q Okay. Let's go back to a concrete example. You did have it insured?

A Yes.

Q So the premium on this particular aircraft was a cost to this particular aircraft; right?

A Yes, sir.

Q And that's not included in your costs that you deducted off?

A No, sir.

Tr. 451:11-19. It costs to have a pilot and a co-pilot fly the plane. Tr. 451:20-22. At that time Plaintiffs tried to have three crews per airplane, Tr. 452:22-23, and expenses of crews are salary, health benefits, workers comp, taxes, training expenses, Tr. 453:2-5. Plaintiffs had to put money into pilot training, but that is not one of the costs deducted. Tr. 453:16-22. Although the amount of the training expense depends on how many pilots being trained, Plaintiffs' president testified it was a fixed cost, so it was not deducted. 453:19-454:2. Debt payment or interests expense on the airplane was not deducted from revenue, Tr. 454:3-7, even

though this particular airplane had been financed by Compass Bank, Tr. 409:7-410:6. Significantly, no deduction of any kind was made for depreciation, either of an additional aircraft or any other capital asset of the business:

Q How about depreciation?

A As an expense?

Q Yes.

A No, did not deduct depreciation.

Tr. 454:17-30.

By reason of Plaintiffs' complete failure to subtract expenses other than fuel and maintenance that are necessarily involved in producing income hauling cargo using a Falcon 20 aircraft, including rent or mortgage, utilities, support staff and administrative staff salaries, benefits, taxes, pilot and co-pilot salaries, insurance, supplies, depreciation and interest expense, and Plaintiffs' complete failure to introduce any evidence of such expenses for a reasonable prior period, Plaintiffs failed to make a submissible case of loss of profits. Meridian, 910 S.W.2d at 331; Brown, 722 S.W.2d at 341; Skinner, 982 S.W.2d at 700; All Star, 727 S.W.2d at 932.

In Meridian, plaintiff was engaged in the business of making group travel arrangements. Meridian sought to recover damages against KCBS, a company formed by a former Meridian consultant, for tortious interference, breach of fiduciary duty and conspiracy arising out of KCBS' taking over group travel arrangements to Hawaii for 575 people with Pier I, an account formerly serviced by Meridian. The trial court granted a directed verdict for defendants on the ground that plaintiff failed to make a submissible case of damages. The Court of Appeals

affirmed, holding that "Meridian's evidence is simply insufficient to prevent the jury from estimating lost profits without resorting to speculation." 910 S.W.2d at 332. Meridian introduced into evidence an exhibit that listed "income" received by KCBS from Pier I for the Hawaii trip as $1,000,745. The exhibit then deducted expenses which included the costs of air travel, hotel, meals, the expense of transporting people from the airport to the hotel and trip activities, pretrip materials, mailing, gratuities and on site travel directors, for a total of $793,311 in expenses. Id. No overhead expenses were listed. The Court said:

> Meridian presented no evidence as to rent or mortgage, utilities, support staff salaries, or other overhead costs Meridian would have incurred from 1988 until Pier 1 took the trip in March, 1990. Meridian also failed to present any evidence the revenue from Pier I's 1990 trip would have constituted such a small portion of Meridian's overall revenues as to not increase its expenses. . . . The fact Meridian's overhead costs would have been expended when Pier I took the 1990 trip or was "ongoing" does not negate the requirement Meridian present evidence of the overhead costs attributable to the 1990 trip. Although not classified as overhead, Meridian further failed to introduce evidence of costs for its program administrator.

910 S.W.2d at 332.

In the case at bar, Plaintiffs failed to introduce evidence of many categories of costs and expenses of the business which were necessarily involved in the production of income using an additional aircraft, including interest costs, insurance costs, depreciation, pilot and co-pilot salaries, benefits and training, and hangar rent, as well as the expense of salaries or

wages for administrative personnel, clerks, bookkeeping and accounting employees, and other support staff necessary to book cargo flights and collect revenue generated, as well as overhead costs, depreciation of other capital assets, utilities, telephone expense, and advertising, at least a portion of which must fairly be allocated to a significant percentage of projected increased business. Certainly the variable costs and expenses tied to an additional aircraft (such as interest, depreciation, insurance, pilot and crew expense and hangar rental) must be deducted in any calculation of profit. Under Meridian, Plaintiffs failed to make a submissible case by failing to present evidence as to rent or mortgage, utilities, support staff and other overhead costs Plaintiffs would have incurred from May, 1998 to August, 1999. Accordingly, the evidence is "simply insufficient to prevent the jury from estimating lost profits without resorting to speculation." 910 S.W.2d at 332.

Failure to introduce evidence of depreciation, either on Falcon 20 aircraft or on other hard assets utilized in Ameristar's cargo shipping business, leaves the evidence insufficient to support an award of lost profits. Coonis v. Rogers, 429 S.W.2d at 714 (gaps in proof of the cost and expense of operating the business during relevant periods, including absence of proof of depreciation, resulted in an inability to ascertain net profits or losses and a lack of evidentiary basis for an award of damages).

On the record presented, it is impossible to speculate what the proper amount to deduct for depreciation on a Falcon 20 aircraft purchased for $1,415,000 would be. There is no evidence on this issue. At that time, Plaintiffs tried to have three crews per airplane. Tr. 452:22-23. What is the amount of the salary Plaintiff would have paid the pilot and co-pilot crews for an additional Falcon 20, and what expense would Plaintiff have incurred for workers'

compensation insurance for pilots, pilot training, or training expenses paid to pilots and co-pilots for this aircraft? On the record, the jury and this Court can only speculate, because there is a total absence of evidence on this point. What would be the amount of the premium for insuring the Falcon 20 against loss due to fire, theft, casualty or other perils? Plaintiffs never introduced any evidence of this expense–Plaintiffs' President said he did not the cost of insurance for a Falcon 20. Tr. 450:23-24. What interest payments would be required to finance the purchase of another Falcon 20 aircraft (as the one in question had been financed, Tr. 409:7-410:6)? The jury in this case was never told what the debt service or interest expense on the airplane was. What was the amount of lease payments on similar aircraft recorded in Plaintiffs' books to represent amounts of rent credited to Sierra from Ameristar under their oral lease arrangement? Again, Plaintiffs' President did not know exactly which lease payments were on each airplane, and the jury was not told. Tr. 369:6-21. During times when the Falcon 20 airplane would be parked on the ground, what is the amount of the expense of hangar rental for the airplane? No evidence of any of these categories of costs, directly associated with the use of an additional aircraft, for any period before or after the off-airport landing, were ever introduced into evidence. Consequently, by reason of Plaintiffs' failure and, indeed, deliberate refusal to take into account or introduce into evidence the actual facts regarding these variable amounts of expenses necessarily involved in producing income from shipping cargo using a Falcon 20 aircraft, Plaintiffs failed in their proof.

Not only categories of variable expenses, but other "fixed" expenses were not shown or deducted: salaries and benefits for secretaries, billing and accounting personnel, personnel involved in scheduling air cargo shipments, other administrative staff, officers; rental or

mortgage payments on the office headquarters; depreciation on office buildings, office equipment and office furniture; debt service on buildings, furniture and equipment; general liability insurance premiums; utilities, advertising and telephone expenses. Like the plaintiff in the Meridian case, Plaintiffs failed to present any evidence that the revenue from the use of an additional Falcon 20 aircraft would represent such a small portion of Plaintiffs' overall revenues as not to increase such expenses despite the requirement set out in Meridian, at 332, citing High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493, 502-03 (Mo. 1992). Indeed, Plaintiffs' damage calculation embodies the assumption that having one additional airplane over the period from May, 1998 to August, 1999 would have enabled Ameristar to generate anywhere from 8.34% more revenue (in June, 1999) to 24.03% more revenue (in May, 1998). Nevertheless, the jury was not given the information necessary to apportion and deduct 8.34% to 24.03% of Plaintiffs' overhead, depreciation, interest, advertising, staff, utilities and insurance costs, or any portion thereof, from the claimed revenue numbers.

On the record, it is impossible to tell whether, after deduction of costs and expenses of doing business, Plaintiffs made a profit in any time period before or after the off-airport landing. Absent evidence of the costs and expenses for a reasonable time prior to the off-airport landing, and subtraction of relevant expenses to arrive at a net profit figure, Plaintiffs failed to prove any loss of profits.

(2) **Plaintiffs failed to introduce evidence of income or expenses for a reasonable time prior to the off-airport landing.**

In the case at bar, what is "indispensable" to proof of lost profits is lacking. Plaintiffs did not present evidence of income and expenses for a reasonable period prior to the time the

aircraft made an off-airport landing. Plaintiffs presented only information regarding revenue and fuel and maintenance costs after that time and thus failed to prove what the Coonis v. Rogers, Anderson, Brown, Gesellschaft, Meridian, Thoroughbred Ford, Farris, McGinnis, and Morrow cases say is "indispensable": the historical information regarding the established track record of profits for a reasonable prior period. Plaintiffs did not offer any evidence as to the costs and expenses of its cargo business with a consequent establishing of net profits during any period previous to January, 1998. Without that information, any inference of lost profits going forward is wholly speculative, just as it would be with a start-up business. Was Plaintiffs' profit more, less or the same in the period after the off-airport landing than Plaintiffs experienced before? The jury, and this Court, can only speculate. Plaintiffs did not present the evidence to permit the necessary comparison.

Plaintiffs presented utilization charts regarding how much revenue was generated transporting cargo for customers with five airplanes in May, 1998, six airplanes in June, 1998, five airplanes in July, 1998, six in August, 1998, eight from September, 1998 through November, 1998, nine in December, 1998, eight in January, 1999, nine airplanes in February and March, 1999, eleven airplanes in April, 1999 and twelve airplanes from May to August, 1999. Exs. 135 and 136. The monthly gross revenue in that time varied from $636,015.70 in July, 1998 to $4,361,881.49 in June, 1999. The average flight hours per airplane varied from 59.06 (295.3/5) by five airplanes in June, 1998 to 159.5 (1914.9/12) by twelve airplanes in June, 1999. Plaintiffs' theory simply assumes that having one additional plane would have resulted in Ameristar having 124.03% as much revenue and profit in May, 1998 as it did; 120.89% as much revenue and profit in June, 1998; 121.01% as much revenue and profit in

July, 1998; 116.67% as much revenue and profit in August, 1998; 114.24% as much revenue and profit in September, 1998; 112.45% as much revenue and profit in October, 1998; 112.52% as much revenue and profit in November, 1998; 110.99% as much revenue and profit in December, 1998; 113.21% as much revenue and profit in January, 1999; 111.36% as much revenue and profit in February, 1999; 111.05% as much revenue and profit in March, 1999; 109.4% as much revenue and profit in April, 1999; 109.93% as much revenue and profit in May, 1999; 108.34% as much revenue and profit in June, 1999; and 108.81% more revenue and profit in July, 1999. Exs. 134-136; pp. 29-30 above.

This theory is not supported by anything but assumption. There is no expert testimony to project, based on historical trends or any other data, that the business to support the incremental projected amounts existed. There is absolutely no evidence whatsoever that Plaintiffs turned away a single customer, or were forced to forego accepting a single load of cargo, by reason of the lack of an additional airplane.

There is no evidence of historical business trends to support the assumption that Ameristar's revenues or profits would have been higher. There is no evidence to show whether revenues in May through December in 1998 were higher or lower than in 1997, or any prior year, because no evidence of any prior year's revenues was ever introduced. Absent evidence of the prior results of the business, any attempt to project future profit operates in a vacuum. As in Jack L. Baker Companies, 413 S.W.2d at 271, the lack of month to month results over a period of time prevents any rational estimate of later profits. In the Jack L. Baker Companies case, this Court held the trial court properly instructed the jury to disregard evidence of lost profits in a suit for damages arising out of an explosion and fire in plaintiff's business

premises. The Court found that tax returns for 1962 through 1964 and a monthly profit and loss analysis for 1963 introduced into evidence did not provide a substantial basis for determining lost profits resulting from the interruption of the business by the explosion on October 15, 1963. The Court stated:

> There is no evidence to show a steady trend from loss to profit from the inception of corporate operations on March 1, 1962, to the year 1964. There was no evidence to show a month by month increase in business in 1962. The tax return gave no breakdown by months and plaintiff did not see fit to introduce a corporate month by month profit and loss

analysis as it did with respect to 1963. An examination of the monthly profit and loss figures for the year 1963 discloses a

very uneven and erratic performance as regards profits. The company operated in the black during only three of the twelve

month
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that
year.
Operat
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59,
$448.
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9,
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80,
$807.
11,

$979.47 and $1,996.81 are shown for the months of January, February, March, April, July August, September, October and

December of 1963. Operating profits of $978.68, $1,386.47 and $906.96 appear for the months of May, June and

November. This certainly does not show a trend from an unprofitable operation in 1962 to a profitable operation in 1963.

See Farris, 745 S.W.2d at 264 (requirement for proof of lost profits is not satisfied by

evidence consisting of tax returns which did not allow comparison of profitable and unprofitable periods of operation of the business).

In this case, Plaintiffs introduced far less proof of prior operations than was introduced in the Jack L. Baker Companies case–in fact, Plaintiff introduced nothing to show actual profit of its business in any month or year prior to the off-airport landing. The charts containing revenue figures only beginning in January, 1998, are inadequate to support any inference regarding profit or loss, much less trends prior to the off-airport landing.

The only months in which the Falcon 20 was in service for a full month were February and March, 1998. Far from having decreased revenues or profits in the same months a year later, the revenue figure increased from $1,016,064.38 in February, 1998 to $1,257,216.28 in February, 1999 and the revenue figure increased from $1,240,850.14 in March, 1998 to $1,791,914.19 in March, 1999. Exhibits 136 and 137. Year over year, Plaintiffs' evidence showed Ameristar had greater revenue in 1999 without the aircraft than it had in 1998 with the aircraft. There is no evidence that revenues or profits were lower in any comparable month because the Falcon 20 was not in service. There is no evidence to suggest that revenues or profits were lower in any month after April, 1998 than in any comparable prior period, because there was no evidence of any revenues or profits for any period prior to January, 1998.

The number of Falcon 20's in use more than doubled from five such aircraft in May, 1998 to twelve in May of 1999, and the total number of hours flown (13,761) and total revenue ($30,640,226.11) from January through November 1999 was nearly double that in all 1998 (7,917.5 hours; $17,139,091.21). Compare Ex. 135 to Ex. 136; App. A-6, A-7. Plaintiffs failed to present any evidence to show that any revenue or profit was lost, that any customer

was lost, or that any opportunity to ship cargo was lost. Plaintiffs' calculation of damages was built on the unsupported assumption that profit was lost. Nothing but speculation supports the supposition that a single additional dollar of revenue would have been generated if another aircraft were available over that period, or that Ameristar turned down a single load of cargo due to the unavailability of an airplane.

Plaintiffs contend the Court should disregard the requirement that proof of income and expenses for a reasonable anterior period is "indispensable" to support a claim for lost profits. Plaintiffs rely on Whitman's Candies v. Pet, Inc., 974 S.W.2d 519, 527 (Mo.App. 1998), emphasizing that it is the net loss, not the gross loss, that must be established, and that loss of net profits may be established where there is sufficient evidence of lost profit by testimony, in that case, of the net profit per box of chocolate coupled with testimony of an expert as to the number of lost sales over a three year period (2.711 million boxes of chocolate over a three year period at $1.79 net profit per box). The Whitman's Candies case does not support Plaintiffs contentions, both because Plaintiffs did not present a net profit figure per mile or per aircraft since they failed to deduct applicable fixed and variable expenses, and because Plaintiffs introduced no expert evidence of the actual number of revenue miles or hours lost by reason of the unavailability of an additional Falcon 20 aircraft, instead simply assuming that number would equal the miles and hours of other aircraft which were in service after the off-airport landing. Without evidence of historical data and trends, there is no basis for finding that Plaintiffs' business would have expanded as Plaintiffs assumed.

(3) **Plaintiffs failed to introduce the best evidence available, because they did not introduce any business records showing actual income and expenses,**

and the numbers of hours of aircraft utilization in the charts introduced were on their face inconsistent and unreliable.

Plaintiffs' evidence was also insufficient because Plaintiffs did not present the actual business records from which the profits calculation was generated, or of any prior period to permit a comparison between the period for which Plaintiffs claimed to have lost profits and any prior period. As a result, Plaintiffs failed to introduce the best available evidence to support the estimation of the amount of lost profits, as required in Hargis, 306 S.W.2d at 569; Moss, 301 S.W.2d at 773; Gesellschaft, 967 S.W.2d at 147; Meridian, 910 S.W.2d at 331; and Ibarra, 838 S.W.2d at 39. In Meridian, it was held that plaintiff failed to produce the best evidence available where it "did not introduce its tax returns or offer testimony of the accountant who prepares the returns," and failed to introduce financial records of income and expenses for a reasonable anterior period. Accord, Skinner, 982 S.W.2d at 700. Here, Plaintiffs likewise did not introduce any tax returns or accountant's testimony, and although they had audited financial statements, they did not introduce them into evidence.

In the absence of actual business records establishing the revenue, operating expenses and depreciation of Plaintiffs' business–or of any part or segment of the business--for any period prior to the off-airport landing, it is impossible to make a reasonable estimate of Plaintiffs' profits, or to know whether they were in fact diminished or unaffected by the lack of an additional airplane. The absence of such evidence results in a failure of proof of "actual facts or reliable data" to permit a reasonable estimate of the amount of Plaintiffs' profits. Morrow, 123 S.W. at 1040. As stated in Morrow:

These books, as usually kept, would contain entries such as no memory could

> accurately preserve, and would show the very essential facts upon which the plaintiffs could recover, if at all, for the loss of profits in their business. And yet no books were produced, and no explanation was given showing that they were lost or not within the possession of the plaintiffs, but reliance was had, as a substitute, upon the memory of one of the interested parties. . . . Besides this, there is an entire failure of the evidence to show in any way what were the total returns of the plaintiffs' business, the amount of the operating expenses, and the depreciation of capital, if any, during any previous fixed period of time. Without such a showing, under the authorities cited, there were no actual facts or reliable data given in evidence that would enable the jury to form a reasonable estimate of the amount of plaintiffs' profits.

Id.

In this case, there is a complete absence of proof of any costs or expenses of any kind prior to the off-airport landing, and no documentary evidence of expenses thereafter. No business record showing actual expenditures for any expense of doing business was introduced. Plaintiffs did not even introduce any business record to show the actual amount of expenses of fuel and maintenance of aircraft used to generate revenue. The same is true on the revenue side: No business record showing actual revenues for any period prior to or after the accident was ever introduced. The statements of Plaintiffs' President and charts he prepared are not the best evidence available of the costs and expenses of the business.

The failure to introduce the actual records establishing revenues and costs and expenses of business operations for a prior period is clear in this case. Essentially, Plaintiffs introduced

five sheets of paper, Exs. 134, 135, 136, 137 and 138 (App. 5, 6, 7, 8 and 9) relating to use of Falcon jets after the aircraft in question landed off-airport as evidence on the lost profit claim. Notably, the numbers of hours of flight by aircraft per month reported in Exs. 135 and 137 for 1998 and in Exs. 136 and 138 for 1999, information that is crucial in deriving both major factors in the damages calculation (revenue per hour and hours per month per aircraft), do not match. Hours of usage reported on Ex. 135 (App. 6) for one aircraft in a given month frequently do not match the hours reported on Ex. 137 for the same aircraft for the same month. The same is true of Exs. 136 and 138. The numbers supposedly came from Ameristar's business records, but the numbers do not match. More than seventy discrepancies in the flight hours of specific aircraft (different numbers of flight hours for the same aircraft in the same month) in the charts introduced are described above in the Statement of Facts, pp. 24-29 above. The jury, and this Court, could only speculate regarding which numbers in Exs. 135 to 138 actually reflect Plaintiffs' business operations, because the underlying records were not introduced. As in Meridian, "[t]he testimony and exhibit[s] simply did not constitute the best evidence available." 910 S.W.2d at 332.

Plaintiffs' President, Tom Wachendorfer, testified that Plaintiffs maintained financial records which were audited by Jackson Rhodes, a CPA firm. Tr. 373:10-16. He testified that his company maintains books and records in the ordinary course of its business and that the flight hour and revenue numbers in Exhibits 134, 135, 136, 137 and 138 were taken from those records. Tr. 343:3-8,17-23; 345:10-25; Tr. 351:9-23; Tr. 366:9-21. Although Mr. Wachendorfer testified Plaintiffs had contracts for favorable prices for fuel, Tr. 359:23-25, the contracts were not introduced. Plaintiffs did not introduce its audited financial records.

They did not introduce their tax returns or offer testimony of the accountant who prepares the returns. Plaintiffs did not introduce any of their books and records maintained in the ordinary course of business. Accordingly, Plaintiffs failed to adduce the best available evidence to establish either the income or the costs and expenses of the business. Meridian, 910 S.W.2d at 332. The testimony of Plaintiffs' President that audited financial records and business records were maintained is important, because it shows that Plaintiffs failed to present available records of prior costs and expenses despite their availability, which demonstrates "a failure to adduce available evidence which might have substantiated the estimated loss." Moss, 301 S.W.2d at 773.

Even if the fact that Plaintiffs had business records containing the actual information regarding gross receipts and expenditures, including audited financial statements, had not been acknowledged by Mr. Wachendorfer (Tr. 342:16-25; 343:17-23, 345:23-25, 351:21-23, 366:9-21, 373:10-22), the fact that such a business could not be carried on successfully under modern methods and conditions without such books is a "matter of common knowledge". Morrow, 123 S.W. at 1039. The failure to introduce such a set of books to establish the total revenues of Plaintiffs' business, the actual amount of operating expenses and the depreciation of capital during any previous period establishes that "there were no actual facts or reliable data given in evidence to enable the jury to form a reasonable estimate of the amount of Plaintiff's profits." Id., at 1040. Mr. Wachendorfer's statements and charts, without introduction of the actual records, is an inadequate substitute. As in Morrow, "[t]o suffer the judgment to stand, based on such evidence, would be to allow an interested Plaintiff to guess the money out of his adversary's pocket into his own, and make the court ratify the confiscatory process." Id. at

1041. Because there is no sufficient evidence to support Plaintiffs' claims for lost profits, the Judgment must be reversed.

III. THE TRIAL COURT ERRED IN REFUSING TO GIVE A CONTRIBUTORY NEGLIGENCE INSTRUCTION REQUESTED BY DEFENDANT OR TO SUBMIT TWO PACKAGES OF INSTRUCTIONS WITH CONTRIBUTORY NEGLIGENCE AS A BAR TO CLAIMED ECONOMIC LOSS IN THE FORM OF LOST PROFITS AND INSTEAD SUBMITTING COMPARATIVE NEGLIGENCE BECAUSE CONTRIBUTORY NEGLIGENCE IS AN ABSOLUTE DEFENSE TO A CLAIM FOR ONLY ECONOMIC LOSS IN THAT PLAINTIFFS CLAIMED ONLY ECONOMIC LOSS AND THE FAILURE TO SUBMIT CONTRIBUTORY NEGLIGENCE PREJUDICED DEFENDANT BECAUSE THE JURY FOUND PLAINTIFFS WERE 30% AT FAULT AND NEGLIGENT IN CAUSING THEIR CLAIMED ECONOMIC LOSS. IN THAT THE JURY DID FIND CAUSAL FAULT IN PLAINTIFFS, THE TRIAL COURT FURTHER ERRED IN DENYING PLAINTIFFS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND ENTERING JUDGMENT FOR PLAINTIFFS BECAUSE PLAINTIFFS' CONTRIBUTORY NEGLIGENCE IN CAUSING CLAIMED ECONOMIC LOSS BARRED AN AWARD OF DAMAGES AGAINST DEFENDANTS.

Standard of Review

Motions for directed verdict and judgment notwithstanding the verdict challenge the submissibility of the plaintiff's case. Coon, 46 S.W.3d at 88. A case is not to be submitted to the jury unless each fact essential to liability is predicated upon legal and substantial evidence. Washington, 897 S.W.2d at 615; Coon, 46 S.W.3d at 88. To determine whether the

plaintiff has made a submissible case, the appellate court views the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiff. Id. A case will not be withdrawn from the jury unless there is no room for reasonable minds to differ. Id. Where, as here, the case involves only economic damages, it is error to submit a comparative fault instruction to the jury on the claim. Chicago Title Ins. Co. v. Mertens, 878 S.W.2d 899, 902 (Mo.App. 1994).

Argument

The court erred in submitting the case on comparative fault instructions (see Instruction Nos. 7 and 8) and not giving the contributory damage instruction proffered by Defendant (L.F. 830) for the reason that Missouri courts have held that when cases involve only economic losses, contributory negligence is an appropriate defense.

Plaintiffs claimed only economic losses. Plaintiffs claimed a loss of market value of an aircraft owned by Sierra and lost profits in the use of the aircraft leased by Ameristar. Plaintiffs did not claim any personal injuries. Ameristar's claim for lost profits is clearly a claim for economic loss only. The claim for underinsured loss of claimed market value of the aircraft is for economic loss, because it does not rest on the claim that Dodson damaged or harmed the aircraft itself. Plaintiffs did not contend that Dodson harmed the aircraft itself, but that the way the aircraft was handled made it appear to have a deflection or distortion in the fuselage as it rested on a trailer which caused the insurance company to total it. Tr. 135:23-136:1; 835:12-15. Plaintiffs admit that "The fuselage was not permanently bent," that "it 'popped' back into place once it was removed from the trailer." Brief of Appellants and Cross-Appellants, p. 4. Plaintiffs claim the insurer's representation that the aircraft was permanently

bent and had substantial structural damage was false. Id., p. 13. The claim for underinsured loss not resting on a claim of damage to the aircraft is a claim for economic loss only. There was no substantial evidence of damage to the aircraft caused by Dodson and hence no evidence of property damage caused by Dodson.

Where only economic loss is claimed, Missouri appellate courts have uniformly held that the comparative fault doctrine has no application. Contributory negligence remains an absolute defense. Roskowske v. Iron Mountain Forge Corp., 897 S.W.2d 67, 73 (Mo.App. 1995) ("Comparative fault does not apply to a case involving purely economic damages."); Miller v. Ernst & Young, 892 S.W.2d 387, 388 n. 1 (Mo.App. 1995) ("In this case involving only economic damages, contributory negligence remains an absolute defense."); Chicago Title Ins. Co. v. Mertens, 878 S.W.2d 899, 902 (Mo.App. 1994) (submission of a comparative fault instruction on a claim involving purely economic losses is reversible error, stating "[n]othing in the UCFA indicates that comparative fault should apply in cases involving only economic damages"); Murphy v. City of Springfield, 738 S.W.2d 521, 530 (Mo.App. 1987); Blackstock v. Kohn, No. 73101, 1998 WL 726263, *2 (Mo.App. E.D. Oct. 20, 1998), aff'd on other grounds, 994 S.W.2d 947 (Mo. 1999) ("We follow this court's precedent and hold that contributory negligence is a defense in cases involving economic loss.").[8] Accordingly,

[8] In Blackstock v. Kohn, No. 73101, 1998 WL 726263, *2 (Mo.App. E.D. Oct. 20, 1998), aff'd on other grounds, 994 S.W.2d 947 (Mo. 1999) the Court of Appeals determined that contributory negligence remains a complete defense in cases involving only economic losses, stating:

Defendant's contributory negligence instruction should have been given, and the comparative fault instructions should not have been given.

Defendant was prejudiced by the failure to give the required contributory negligence instruction, because such instruction would have resulted in a defense verdict. There was substantial evidence of Plaintiffs' negligence and the jury found Plaintiffs were negligent, in assessing 30% fault to Plaintiffs under Instruction No. 8, which directed the jury to assess a percentage of fault to plaintiff if they believed plaintiff failed to remove the aircraft from the trailer in order to determine if the distortion was permanent or temporary or failed to have the aircraft undergo an inspection to determine its condition and "[P]laintiff was thereby negligent"

> Since Gustafson [v. Benda, 661 S.W.2d 11 (Mo. 1983)], Missouri appellate courts have uniformly held that the comparative fault doctrine does not apply to cases involving only economic loss. See Murphy v. City of Springfield, 738 S.W.2d 521, 530 (Mo.App. 1987); Chicago Title Ins. Co. v. Mertens, 878 S.W.2d 899, 902 (Mo.App. 1994); Roskowske v. Iron Mountain Forge Corp., 897 S.W.2d 67, 73 (Mo.App. 1995). None of these cases, however, specifically hold that contributory negligence remains in effect in economic loss actions. Thereafter, this court took the next logical step and held that contributory negligence remains an absolute defense in cases involving only economic damages. Miller v. Ernst & Young, 892 S.W.2d 387, 388 n.1 (Mo.App. 1995). . . . We follow this court's precedent and hold that contributory negligence is a defense in cases involving economic loss.

and such negligence of plaintiff directly caused or contributed to cause any damage plaintiff may have sustained. L.F. 681, 685 (assessing 30% fault to Ameristar). Because contributory negligence remains a defense in an economic loss case, the Court should enter judgment in favor of defendant as a matter of law, or at the very least grant a new trial to permit that defense to be submitted to the jury.

The undisputed evidence showed that there was no property damage in that there was no damage to the airplane--only perceived damage. Accordingly, there was no property damage caused by Dodson and thus contributory negligence should have been applied to Plaintiffs' claim against Dodson. Because there was no actual property damage, nothing removes this case from the application of contributory negligence.

In the alternative, the Court erred by failing to submit two instruction packets to the jury containing both comparative fault and contributory negligence instructions. Certainly the claim of Ameristar as lessee of the aircraft for lost profits in the loss of use of the aircraft is a claim for purely economic damage to which Ameristar's contributory negligence is a complete defense. The jury's determination that Ameristar was 30% at fault establishes Ameristar's contributory fault on Ameristar's claim for loss of profits, which is a pure economic loss claim, and is distinct from Sierra American's claim as aircraft owner for lost market value. Defendant requested that the Court submit two packages of instructions, with property damage to be submitted on comparative fault instructions and Ameristar's economic loss claim for lost profits submitted on a contributory negligence instruction. The trial court refused. Tr. 996:20-997:9. The trial court's refusal to submit a separate package, instructing the jury that it must find for Defendant on Ameristar's economic loss claim if they believed

Ameristar was contributorily negligent, was prejudicial error. The jury's finding that Ameristar was 30% at fault requires reversal of any judgment for the economic damage claim for lost profits.

IV. THE TRIAL COURT ERRED IN ADDING THE WORDS "IF PLAINTIFF REASONABLY SHOULD HAVE DONE SO" TO EACH SPECIFICATION OF PLAINTIFFS' CONDUCT IN THE MITIGATION OF DAMAGES INSTRUCTION, INSTRUCTION NO. 9, OVER DEFENDANT'S OBJECTION, BECAUSE THE ADDITIONS DEVIATE FROM MANDATORY MAI FORMS AND SUCH DEVIATION IS PRESUMED PREJUDICIAL ERROR AND IN FACT PREJUDICED DEFENDANT, IN THAT INSTRUCTION NO. 9 DIRECTED THE JURY TO FIND PLAINTIFF FAILED TO MITIGATE DAMAGES IF PLAINTIFF FAILED TO PURCHASE THE AIRCRAFT FROM DEFENDANT FOR $1,500,000 OR FAILED TO PURCHASE THE AIRCRAFT SALVAGE "IF PLAINTIFF REASONABLY SHOULD HAVE DONE SO," WHICH IMPROPERLY REPEATS THE REASONABLENESS REQUIREMENT WHICH IS PROPERLY SUBMITTED IN THE SECOND PARAGRAPH OF THE APPROVED MAI FORM, AND SUCH INSTRUCTION WAS CONFUSING AND A MISSTATEMENT OF THE LAW, AND DEFENDANT WAS THEREBY PREJUDICED IN PART BECAUSE NO SIMILAR QUALIFICATION WAS INSERTED IN THE INSTRUCTION HYPOTHESIZING DEFENDANT'S ALLEGED ACTS OF NEGLIGENCE.

Standard of Review

When reviewing a claim of instructional error resulting from an alleged deviation from MAI, the Court applies the following principles: (1) where MAI prescribes a particular instruction, that instruction is mandatory and the failure to give it is presumed to be prejudicial;

(2) the burden is on the party who offered the erroneous instruction to show that it was not prejudicial; (3) whether the error was prejudicial is to be judicially determined and (4) no judgment will be reversed on account of instructional error unless the error was in fact prejudicial. Hein v. Oriental Gardens, Inc., 988 S.W.2d 632, 634 (Mo.App. 1999). Accord, Lay v. P&G Health Care, Inc., 37 S.W.3d 310, 329 (Mo.App. 2000); Citizens Bank of Appleton City v. Schapeler, 869 S.W.2d 120, 128 (Mo.App. 1993).

Argument

The insertion of the words "if plaintiff reasonably should have done so" in each hypothesized specification of Plaintiffs' negligence in the mitigation of damages instruction, Instruction No. 9, constituted erroneous deviations from MAI prejudicial to Defendant.

Instruction No. 9 directed the jury to find plaintiff failed to mitigate damages if they believed plaintiff:

> a) failed to purchase the subject aircraft from defendant for $1,500,000 if plaintiff reasonably should have done so, or
>
> b) failed to purchase the aircraft salvage if plaintiff reasonably should have done so, and
>
> Second plaintiff in one or more of the respects submitted in Paragraph First, thereby failed to use ordinary care. . . .

L.F. 682 (Emphasis added). Defendant objected to the addition of the words "if plaintiff reasonably should have done so". Tr. 987:4-988:16.

The addition of the words "if plaintiff reasonably should have done so" deviates from

the form of MAI 32.29 [2002 New],[9] the approved instruction for submitting mitigation of damages, and is redundant, because it adds and repeats a reasonableness requirement which is properly submitted in the second paragraph, that plaintiff thereby failed to use ordinary care.

Missouri Supreme Court Rule 70.02(b) requires that whenever Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject. Where, as in this case, MAI prescribes a particular form of instruction, its submission is mandatory, the failure to give it is erroneous and the error is presumed prejudicial.[10]

The language, "if plaintiff reasonably should have done so," clearly deviated from the

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[9] MAI 32.29 [2002 New] (Sixth Ed. 2002) is as follows:

If you find in favor of plaintiff, you must find that plaintiff failed to mitigate damages if you believe:

First, plaintiff (*insert act sufficient to constitute failure to mitigate, such as "failed to return to work"*), and

Second, plaintiff thereby failed to use ordinary care, and

Third, plaintiff thereby sustained damage that would not have occurred otherwise.

[10] Lay, 37 S.W.2d at 329; Hein, 988 S.W.2d at 634; Citizens Bank of Appleton City, 859 S.W.2d at 128. The use of an applicable MAI instruction is mandatory, and it is erroneous to deviate from the MAI form. Cova v. American Family Mut. Ins. Co., 880 S.W.2d 928, 930 (Mo.App. 1994); Venitz v. Creative Management, Inc., 854 S.W.2d 20, 23 (Mo.App. 1993).

approved MAI instructions, and therefore, constituted presumptively prejudicial error. Lay, 37 S.W.2d at 329; Hein, 988 S.W.2d at 634; Citizens Bank of Appleton City, 859 S.W.2d at 128.

The addition of the unapproved repetitive language "if plaintiff reasonably should have done so" to Instruction No. 9 prejudiced Dodson in that in each occurrence it was, in effect, a double submission of negligence that confused and misled the jury. The phrases in the submission of negligence in paragraph first of a mitigation of damages instruction are to describe the conduct alleged to be negligent or to exhibit a lack of ordinary care; it is the function of the second paragraph to direct the jury to consider whether that conduct was negligent or constituted a failure to use ordinary care.

Adding the reasonableness requirement to every disjunctive phrase hypothesizing Plaintiffs' negligent conduct required the jury to reflect on the reasonableness of Plaintiffs' conduct twice, and allowed the jury not to proceed to paragraph second of the instruction, even if they believed that Plaintiffs failed to failed to buy the aircraft for $1,500,000 or for salvage, unless the jury concluded that Plaintiffs reasonably should have done so. The instructions misstate the law, because they imply that even if the jury believes that Plaintiffs unreasonably failed to buy the aircraft, the jury could nonetheless find that such unreasonable conduct was not negligent, i.e., that it is a separate question whether Plaintiffs' unreasonable conduct a failure to use ordinary care.

Defendant was additionally prejudiced by the addition of the "if plaintiff reasonably should have done so" to every specification of Plaintiffs' negligence in the mitigation of damages instruction because no parallel language was added to the specifications of

Defendant's negligence in Instruction No. 7, L.F. 680, in which the jury was directed to assess fault to Defendant if the jury believed it failed to follow the maintenance manual or the FAA rules or regulations in the disassembly, loading and transportation of the aircraft, but the jury was not instructed to consider "if defendant reasonably should have done so." The jury was effectively required to hesitate, to think twice, before finding the Plaintiffs acted or omitted to act as described in Instruction No. 9 and thereby failed to exercise ordinary care, but the jury was not required to think twice before finding Defendant acted or failed to act as submitted in Instruction No. 7. The asymmetry in the Court's editing additional reasonableness language into instructions positing Plaintiffs' conduct in the mitigation of damages instruction, effectively increased the burden on Defendants and made it less likely the jury would find failure to mitigate on the part of Plaintiffs. The deviations from MAI were prejudicially erroneous, and require reversal.

V. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND IN ENTERING JUDGMENT FOR PLAINTIFFS AGAINST DODSON BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE AND INSUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT DEFENDANT CAUSED DAMAGE TO THE FALCON 20 AIRCRAFT, CAUSED ANY LOSS IN MARKET VALUE OF THE AIRCRAFT, OR CAUSED AMERISTAR'S CLAIMED LOSS OF PROFIT, IN THAT (1) THE APPARENT DEFLECTION IN THE FUSELAGE WAS NOT PERMANENT BUT POPPED BACK INTO SHAPE WHEN THE AIRCRAFT WAS REMOVED FROM THE TRAILER, (2) WHEN THE MANUFACTURER'S REPRESENTATIVE MEASURED THE AIRCRAFT IT WAS WITHIN TOLERANCES AND

WITHOUT EVIDENCE OF PERMANENT DEFORMATION, (3) BONDED INSPECTIONS FOUND NO DEFECTS WHEN IT PERFORMED EDDY CURRENT AND ULTRASONIC TESTING OF THE WING ATTACH FLANGE, THE FUSELAGE ATTACH FLANGE, THE MAIN LANDING GEAR AND SUPPORT AREAS, AND THE CENTER BOX AND WING TO FUSELAGE ATTACH AREAS, (4) THE AIRCRAFT RESOLD IN AUGUST, 1998 FOR $1,400,000 PLUS A LEAR JET VALUED AT $250,000, (5) PLAINTIFFS WERE PAID $1,500,000 BY HOUSTON CASUALTY COMPANY, AN AMOUNT EQUAL TO ITS CLAIMED LOSS, FOR AN AIRCRAFT SIERRA PURCHASED FOUR MONTHS EARLIER FOR $1,412,500, (6) PLAINTIFFS CHOSE NOT TO BUY THE AIRCRAFT FROM HOUSTON OR TO BUY IT FROM DODSON IN JUNE, 1998 FOR $1,500,000.00 SUCH THAT ANY LOSS OF USE THEREAFTER WAS NOT CAUSED BY DODSON BUT BY PLAINTIFFS' CHOICE.

Standard of Review

On review of a jury verdict, the appellate court considers the evidence in the light most favorable to the verdict, giving the prevailing party all reasonable inferences from the verdict and disregarding the unfavorable evidence. Joel Bianco Kawasaki Plus v. Meramec Valley Bank, 81 S.W.3d 528, 537 (Mo. 2002); Nemani v. St. Louis University, 33 S.W.3d 184, 185 (Mo. 2000), cert. denied, 532 U.S. 981, 121 S.Ct. 1623, 149 L.Ed.2d 485 (2001). While the court will not supply missing evidence or give a plaintiff the benefit of unreasonable, speculative, or forced inferences, it will not overturn a verdict unless there is a complete absence of probative facts to support it. 81 S.W.3d at 537; Coon, 46 S.W.3d at 88. The question whether the evidence is substantial is a question of law for the Court. Meridian, 910

S.W.2d at 331. To make a submissible case in a negligence action, plaintiff must prove that the defendant failed to exercise that degree of care that an ordinarily careful person would use under the same or similar circumstances and that as a direct result thereof plaintiff sustained damage.

Argument

There was no substantial evidence adduced at trial that Dodson's recovery and transportation of the aircraft damaged the aircraft and there was substantial evidence that Dodson did not damage the aircraft. While the evidence showed that an apparent deflection in the fuselage wingbox was observed when the aircraft rested on the flatbed trailer, the evidence was undisputed that the apparent deflection was temporary and not permanent, that the deflection popped back into shape when the aircraft was removed from the trailer and reassembled. Tr. 834:6-13; 834:18-23; 970:16-971:3.

Plaintiff Ameristar's Director of Maintenance, Lyndon Frazer, testified that after offering Dodson $900,000.00 for the aircraft, Ameristar found out the aircraft, in fact, was not damaged. Tr. 438:7-11. Plaintiffs acknowledge that they never contended the deformation was permanent, only that the way the plane was handled caused it to be deflected or distorted on the trailer which in turn caused the insurance company to total it. Tr. 834:24-835:16. Plaintiffs' evidence that the aircraft was not damaged and Plaintiffs' acknowledgment they never contended the deformation was permanent renders any inference that the aircraft was damaged unreasonable, because there is a complete absence of probative facts to support it. All parties were in agreement the apparent deflection in the aircraft popped back into shape when the aircraft was removed from the trailer. Because a temporary deflection in materials designed

to have elastic properties does not constitute damage to the aircraft, Plaintiffs failed to state a claim upon which relief can be granted against Dodson, and there is no substantial evidence and insufficient evidence to support a finding that Dodson damaged the aircraft.

The aircraft's manufacturer's representative, Aircraft Structural Engineer Raymond Gaillard, testified that the metals used in the Falcon 20 aircraft have elastic properties, and that it is accepted to have a deflection in a piece and when you stop applying force it goes back into its original position. Tr. 812:5-814:11. Mr. Gaillard measured the aircraft's wings, box section, horizontal stabilizer, fuselage and tail section (Tr. 802:1-4, 803:1-4, 903:23-25) and found that the deflection that appeared in the box section of the aircraft as it sat on the trailer was only temporary and that the measurements were all within manufacturer's acceptable tolerances. Tr. 803:12-16. He found no twisting or bending or deformation in the fuselage. Tr. 803:3-11. Mr. Gaillard's report concludes that the dimensions of the aircraft structure, wing, fuselage and empanage are satisfactory. Tr. 587:10-21; 806:15-24; Ex. 14. Mr. Gaillard testified that there was no evidence that the aircraft sustained any permanent distortion or deflection as a result of Dodson's loading and transport of the aircraft, because the part lined up properly when the wing was re-installed, and that's the "acid test." Tr. 814:12-25. There was no evidence of permanent deformation in this aircraft. Tr. 814:12-25, 819:6-21.

Moreover, Bonded Inspections performed eddy current and ultrasonic testing of the wing attach flange and the fuselage attach flange, the main landing gear and their support areas and the center box and wing to fuselage attach areas, and found no defects and no evidence of cracks, fissures, or deformity. Tr. 298:4-10, 587:22-588:7, 765:3-8; 769:24-770:2; Exs. 7, 8 and 9.

There was also no substantial evidence and insufficient evidence to show that Dodson caused any loss in the market value of the aircraft. Sierra had purchased the Falcon 20 three months before the off airport landing for $1,412,500 by an agreement dated January 9, 1998. Ex. 2. Plaintiffs received $1,500,000 from Houston Casualty Company in May, 1998, an amount equal to the amount Plaintiffs stated in the Proof of Loss was the amount of the loss, approximately $87,500.00 more than Sierra paid for the aircraft four months before. Exs. 1, 5. Moreover, the uncontroverted evidence showed that Dodson resold the aircraft in August, 1998, to Smith Air for $1,400,000 plus the trade of a Lear Jet valued at $250,000. Exs. 28 and 29. Smith Air's prepurchase inspection revealed the aircraft was in pretty good condition and a good purchase for Smith Air. Tr. 913:17-22. Although Plaintiffs' President testified the airplane was worth $1,800,000 in April, 1998, there was no evidence that Dodson's handling of the aircraft caused the aircraft to have a lower market value. There is no evidence that any of the repairs made by Dodson to the aircraft were caused by Dodson's handling of the aircraft or the deflection in the wingbox. There was no substantial evidence that Dodson caused a reduction in the market value of the aircraft.

There was no substantial evidence and insufficient evidence that Dodson caused the loss of use Ameristar claimed, because Ameristar chose not to obtain the aircraft on two occasions, once when Houston's adjustor offered Plaintiffs the opportunity to re-bid on the aircraft as salvage in April, 1998 (Tr. 983:20-984:16), and again when Dodson Aviation offered to sell the repaired aircraft to Ameristar for $1,500,000.00 in early May or June, 1998. Tr. 578:17-21. Any claimed loss of market value or loss of use was caused by Plaintiffs' decision not to repurchase the aircraft when it was offered by Houston in May, 1998 and by Dodson in June,

1998. The causation was entirely Plaintiffs. No reasonable jury, who was not viewing the case as if they were in Plaintiffs' position, as Plaintiffs' counsel repeatedly urged the jury to do in closing argument as discussed under Point VII below, could conclude otherwise.

Plaintiffs have no reasonable explanation for the contention that others caused them to lose the market value or the use of the aircraft after Plaintiffs made the choice not to buy the aircraft in June, 1998. Ameristar claimed it was concerned that Dodson had not properly repaired the aircraft, but it did not conduct a prepurchase inspection of the aircraft. Because all of the claimed loss in market value of the aircraft was the result of Plaintiffs' choice not to reacquire the aircraft for the amount it received from Houston, and all of the claimed lost profit after the date the aircraft was reassembled and repaired was the result of Plaintiffs' choice not to reacquire the aircraft for the amount it received from Houston, there is no substantial evidence and insufficient evidence to show that Dodson caused Plaintiffs to lose either the market value of the aircraft or the loss of use of the aircraft.

The evidence does not show but-for causation, that any claimed loss of market value or loss of profits directly and proximately resulted from Dodson's acts. On the contrary, the loss Ameristar claims resulted from the decision of Houston to declare the aircraft a total loss, from the decision of Ameristar to accept Houston's decision, and from Ameristar's decision not once but twice not to repurchase the aircraft in May and June of 1998.

VI. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF THE FEDERAL AVIATION REGULATION DEFINITION OF MAINTENANCE IN EXHIBIT 85, 14 C.F.R. § 1.1, AND IN REFUSING TO TAKE JUDICIAL NOTICE OF THE DEFINITION OF "MAINTENANCE" IN THE FEDERAL AVIATION REGULATIONS IN 14 C.F.R. § 1.1,

BECAUSE THE FEDERAL REGULATION IS NOT HEARSAY AND LONG-ESTABLISHED PRECEDENTS HOLD THAT COURTS WILL TAKE JUDICIAL NOTICE OF FEDERAL REGULATIONS, AND THIS ERROR PREJUDICED DEFENDANT DODSON IN THAT THE JURY INSTRUCTIONS HYPOTHESIZED A VIOLATION OF FEDERAL REGULATIONS AND THE FAILURE TO FOLLOW THE MANUFACTURER'S MAINTENANCE MANUAL IN THE RECOVERY AND TRANSPORTATION OF THE DOWNED AIRCRAFT AS GROUNDS ON WHICH THE JURY WAS PERMITTED TO FIND THAT DEFENDANT WAS NEGLIGENT, AND THE DEFINITION OF "MAINTENANCE" IN THE REGULATION SUPPORTED DEFENDANT'S CONTENTION THAT RECOVERY AND TRANSPORTATION OF A DOWNED AIRCRAFT DOES NOT CONSTITUTE MAINTENANCE AND THAT DEFENDANT NEED NOT FOLLOW THE MANUFACTURER'S MAINTENANCE MANUAL.

Standard of Review

The exclusion of evidence is reviewed on an abuse of discretion standard. Lay v. P&G Health Care, Inc., 37 S.W.3d 310, 331 (Mo.App. 2000). The trial court's ruling is presumed correct, and the party claiming error has the burden of showing the trial court abused its discretion and that he has been prejudiced. "Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." Giddens v. Kansas City Southern Ry. Co., 29 S .W.3d 813, 819 (Mo. 2000), cert. denied, 532 U.S. 990, 121 S .Ct. 1644, 149 L.Ed.2d 502 (2001). Failure to admit evidence does not mandate reversal of a judgment unless the error materially affected the merits of the action,

and is so prejudicial as to deny a fair trial. Id.

Argument

The trial court's exclusion of evidence of the Federal Aviation Regulation definition of "maintenance" in Ex. 85, 14 C.F.R. § 1.1, and its refusal to take judicial notice of the definition of "maintenance" in 14 C.F.R. § 1.1, were clearly erroneous, an abuse of discretion, arbitrary, unreasonable, indicative of a lack of careful consideration, and so prejudicial to Defendant as to deny Defendant a fair trial.

The Court's rulings excluding Ex. 85 and refusing to judicially notice the federal regulation were plainly wrong. Federal regulations are not hearsay. A court may take judicial notice of federal regulations, as courts have done on multiple occasions. Giddens v. Kansas City Southern Ry. Co., 29 S.W.3d 813, 821 (Mo. 2000), cert. denied, 532 U.S. 990, 121 S.Ct. 1644, 149 L.Ed. 502 (2001) ("rules and regulations promulgated pursuant to federal statutes may be judicially noticed and considered as evidence"); Kawin v. Chrysler Corp., 636 S.W.2d 40, 44 (Mo. 1982) ("rules and regulations promulgated by government agencies, pursuant to delegation of authority by Congress . . . shall be judicially noticed"); Farmers State Bank v. Stewart, 454 S.W.2d 908, 916-917 (Mo. 1970) (judicial notice taken of regulations promulgated by the Secretary of Agriculture); Hough v. Rapidair, Inc., 298 S.W.2d 378, 382-383 (Mo. 1957); DePass v. Harris Wool Co., 346 Mo. 1038, 144 S.W.2d 146, 147 (Mo. 1940) (judicial notice taken of ICC rules); Hiatt v. Wabash Ry. Co., 69 S.W.2d 627, 630-631 (Mo. 1933), cert denied, 293 U.S. 560, 55 S.Ct. 72, 79 L.Ed. 661 (1934) (orders of the ICC may be judicially noticed); Van Meter v. Dahlsten Truck Line, Inc., 943 S.W.2d 680, 682 (Mo.App. 1998) (judicial notice taken of federal regulation in Federal Motors Guide);

Fredrick v. Benson Aircraft Corp., 436 S.W.2d 765, 569-770 (Mo.App. 1968) (Missouri courts will judicially notice rules and regulations adopted by government agencies pursuant to delegation of authority from Congress); Twiehouse v. Rosner, 362 Mo. 949, 245 S.W.2d 107 (Mo.App. 1952) (judicial notice taken of the Emergency Price Control Act of 1942 and the Housing and Rent Act of 1947); Hall v. Bucher, 240 Mo.App. 1239, 1242, 227 S.W.2d 96, 98 (Mo.App. 1950).

Moreover, federal statute mandates that federal regulations be judicially noticed, as 44 U.S.C. § 1507 provides that "[t]he contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, may be cited by volume and page number."

The exclusion and refusal to judicially notice the FAR definition of "maintenance" prejudiced Defendants. Plaintiffs' primary theory at trial, embodied in the verdict directing instruction, Instruction No. 7, was that Dodson was negligent because when it was out on the levee, recovering and moving an aircraft that had crash landed in a field, it did not follow the manufacturer's maintenance manual in the various things that it did. The defense theory of the case was that it is not negligence at all not to follow the manufacturer's maintenance manual when you are not doing maintenance, and that recovery and transportation of an aircraft from an off-airport landing site is not doing maintenance..

This central dispute made it essential that Defendant be permitted to present the FAR definition of "maintenance" to the jury. Plaintiffs presented testimony that the FAR regulations require following the manufacturer's maintenance manual when retrieving and transporting an aircraft. A fair presentation of Defendant's case required that Defendant be allowed to introduce the regulation itself to show that the FAR regulations say nothing of the

kind. 14 C.F.R. § 1.1 defines "maintenance" to mean "inspection, overhaul, repair, preservation and the replacement of parts, but excludes preventive maintenance."

Retrieving an aircraft out of a field after a crash landing is not inspection, it is not overhaul, it is not repair, it is not preservation and it is not replacement of parts. The FAA regulations do not require one to follow the manufacturer's maintenance manual when plucking a crashed aircraft out of a field. Plaintiffs were permitted to tell the jury otherwise, and Defendant was prejudiced by being prevented from presenting contrary evidence. Ex. 85 should have been admitted and the Court should have taken judicial notice of the definition of "maintenance."

Without presenting the text of the definition of maintenance, Plaintiffs elicited testimony that the FAA regulations required following the manufacturer's maintenance manual. Even if the federal regulation were hearsay and not subject to being judicially noticed, the regulation, and Ex. 85, should have been admitted under the doctrine of curative admissibility after Plaintiff introduced Alan King's testimony regarding the FAR definition, to rebut Mr. King's statements regarding the regulation. State v. Middleton, 998 S.W.2d 520, 528 (Mo. 1999), cert. denied, 528 U.S. 1167, 120 S.Ct. 1189, 145 L.Ed.2d 1094 (2000) ("where one party repeatedly refers to a hearsay statement, the opposing party may introduce that statement to refute any negative inferences"); State v. Debler, 856 S.W.2d 641, 648-649 (Mo. 1993). Defendant should have been permitted to present the FAR definition that showed Dodson was not performing maintenance. Plaintiff opened the door. Particularly since the jury instructions (Instruction No. 7) hypothesized Defendant violated the regulations, Defendant was entitled to answer Plaintiffs' characterization of the FAA regulations, to remove unfair

prejudice. Fairness demands that the scales not be tipped, that the Court not find Defendant's evidence of the federal regulation's definition of maintenance repugnant while not only admitting Plaintiffs' statements regarding that definition of maintenance but instructing the jury on the assumption that Defendant's recovery and transportation of the aircraft fell within the definition. If Defendant's proffer was hearsay, which Dodson at all times denies, it was necessitated by the same character of evidence Plaintiff had introduced as to the regulation.

The substance of what the trial court was asked to judicially notice was the content of the Federal Aviation Regulation definition of "maintenance" in 14 C.F.R. § 1.1. The trial court should have taken judicial notice of the definition of "maintenance" in the federal regulations when asked to do so. The trial court refused to take judicial notice of the Federal Aviation Regulation's definition of "maintenance" simply because Dodson did not offer an authenticated document containing the definition. The trial court's rationale for refusing to take judicial notice of the regulation was that it was hearsay.

The request for judicial notice of the regulatory definition does not require obtaining and tendering an authenticated document. If authentication were required, the request for judicial notice would be superfluous; and where judicial notice of federal regulations promulgated under authority of Congress may be taken, there is no requirement that the content of the regulations first be presented in authenticated form. A matter of which the trial court can take judicial notice cannot be hearsay, and the trial court erred in refusing to take judicial notice of the regulatory definition of "maintenance" when requested to do so, on grounds of hearsay.

None of the Missouri cases cited above supporting the principle that federal regulations shall be judicially noticed says that the content of regulations may only be judicially noticed if there is an authenticated document demonstrating the content.

The Federal statute which requires courts to take judicial notice of the contents of the Federal Register, 44 U.S.C. § 1507, cannot reasonably be construed to mean that such contents must be shown by presentation of the content only in the form of the Federal Register, and not by presenting the exact same content in the form of an "unauthenticated reprint bearing a private company's copyright." The statute plainly states that there may be "other mode[s] of citation" to the contents of the Federal Register than by volume and page number. If an authenticated document were required to permit judicial notice of a federal regulation, the statute authorizing judicial notice would have no function or use.

The Court of Appeals slip opinion, in footnote 5, itself takes judicial notice of the FAR definition of "maintenance" as meaning "inspection, overhaul, repair, preservation, and the replacement of parts, but excludes preventive maintenance." The content of the definition of "maintenance" in Defendant's Exhibit 85 is exactly the same as reproduced in said footnote 5. Upon Dodson's request, the trial court had the same ability, and responsibility, to take judicial notice of that definition.

Prejudice was unavoidable because Plaintiffs' expert witness, Alan King, was left as the only source of evidence of the regulation, and he inaccurately testified that what Dodson was doing in retrieving the aircraft from a field was "maintenance," contrary to the regulation's definition.

The Court should have admitted Ex. 85 and should have taken judicial notice of the

content of the definition of "maintenance" under the FAR, and permitted it to be read to the jury. Excluding the actual language of the regulation severely prejudiced Defendant. It resulted in the jury not hearing the whole truth, but hearing only Plaintiffs' inaccurate version of what the definition said and meant. It went to the central issue in the case. Such exclusion was unfair and directly produced the verdict because the verdict directing instruction hypothesized that Dodson had violated the federal regulation and failed to follow the aircraft maintenance manual as a basis for finding Dodson negligent.

VII. THE TRIAL COURT PLAINLY ERRED IN NOT GRANTING A MISTRIAL, REPRIMANDING PLAINTIFFS' COUNSEL, OR CAUTIONING THE JURY TO DISREGARD PREJUDICIAL STATEMENTS MADE BY PLAINTIFFS' COUNSEL DURING CLOSING ARGUMENT WHEN HE REPEATEDLY ASKED THE JURY TO PUT THEMSELVES IN PLAINTIFFS' POSITION IN CONSIDERING THE CAUSATION, COMPARATIVE NEGLIGENCE AND MITIGATION OF DAMAGES ISSUES, AND ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL AND ENTERING JUDGMENT IN FAVOR OF PLAINTIFFS BY REASON OF PLAINTIFFS' IMPROPER APPEAL TO JURORS IN CLOSING ARGUMENT TO PUT THEMSELVES IN PLAINTIFFS' POSITION BECAUSE SUCH AN APPEAL IS UNIFORMLY BRANDED AS IMPROPER AND CONSISTENTLY CONDEMNED FOR THE REASON THAT SUCH ARGUMENT ASKS JURORS NOT TO JUDGE THE CASE IMPARTIALLY BUT TO BE NO FAIRER JUDGE OF THE CASE THAN WOULD PLAINTIFF HIMSELF AND AFFIRMS THE ABHORRENT PRINCIPLE THAT ONE MAY PROPERLY SIT IN JUDGMENT ON HIS OWN CASE, AND SUCH ARGUMENT INFLUENCED THE JURY TO DECIDE THE CASE IMPROPERLY WITH BIAS, PASSION

AND PREJUDICE AND IN EFFECT TO DISREGARD THE BURDEN OF PROOF INSTRUCTION AND THE INSTRUCTION THAT IN DETERMINING WHETHER OR NOT TO BELIEVE ANY PROPOSITION, THE JURY MUST CONSIDER ONLY THE EVIDENCE AND THE REASONABLE INFERENCES DERIVED FROM THE EVIDENCE.

Standard of Review

Defendant did not object to Plaintiffs' argument urging the jury to place themselves "in Plaintiffs' position" at the time of the argument, nor request a reprimand or instruction to the jury to disregard the argument nor request a mistrial at the time of the argument, though Defendant requested relief in its post-trial motion on this ground. L.F. 730, 858-859. Although the error was not preserved by objection, this claim of error may be reviewed, in this Court's discretion, for plain error. Roy v. Missouri Pacific Railroad Co., 43 S.W.3d 351, 363-364 (Mo.App. 2001). Defendant respectfully requests this Court to review the argument for plain error and to judge its prejudicial impact, coupled with the prejudice caused by other errors presented.

Argument

Plaintiffs' improper appeal to jurors in closing argument to put themselves "in Plaintiffs' position" was clearly improper. Defendant respectfully submits that such argument resulted in manifest injustice, and requests this Court consider the issue of the improper closing argument for plain error affecting Defendant's substantial rights. Rule 84.13(c).

In closing argument Plaintiffs' counsel repeatedly asked the jury to put themselves "in Plaintiffs' position" in considering issues of causation, comparative fault and mitigation of damages. Tr. 1015:7-11; 1066:4-25; 1069:11-15; 1072:16-20. Plaintiffs argued against the

idea that Plaintiffs "should have bought the airplane back" (Tr. 1014:16-17, 1015:4-6), and told the jury to ask themselves what they would have done if they were "in Ameristar's position" at that time. Tr. 1015:7-11. With respect to Instruction No. 8, the comparative fault instruction, regarding whether Ameristar failed to remove the aircraft from the trailer to determine whether the distortion in the fuselage was temporary or permanent, Plaintiffs' counsel argued the answer to the question whether Ameristar reasonably should have done so is no, and he told the jury "Put yourself in their position." Tr. 1066:4-25. When arguing that the jury should not find Plaintiffs failed to mitigate their damages by failing to buy the aircraft from Dodson for $1,500,000, Plaintiffs' counsel told the jury: "And put yourself in our position at that time." Tr. 1069:11-16. He told the jury:

> You have to ask yourself if you were in Ameristar's position at the time, should you reasonably have purchased the aircraft in order to mitigate your loss? The answer is no.

Tr. 1072:16-20. The character of this argument or plea is "consistently condemned and uniformly branded as improper," the rationale of rejection being that a juror putting themselves in the position of a party "would be no fairer judge of the case than would plaintiff" himself and that such "argument, in effect, affirms as a correct principle that a man may properly sit in judgment on his own case - an idea abhorrent to all who love justice". Faught v. Wesham, 329 S.W.2d 588, 602 (Mo. 1959). Accord, State v. Rhodes, 988 S.W.2d 521, 528-29 (Mo. 1999); Kelsey v. Kelsey, 329 S.W.2d 272, 274 (Mo.App. 1959) (erroneous to overrule objection to argument women jurors put themselves or their children in the place of the plaintiff); Brownridge v. Leslie, 450 S.W.2d 214, 216-217 (Mo. 1970); Edwards v. Lacy, 412 S.W.2d

419, 421 (Mo. 1967) ("A plea to jurors to put themselves in the place of one of the parties has been 'consistently condemned and uniformly branded as improper.'"); Haynes by Haynes v. Green, 748 S.W.2d 936, 939 (Mo.App. 1988) ("It has been recognized in many cases that arguments by counsel suggesting to the jurors that they place themselves in the position of a party to the cause . . . are usually improper, and reversibly erroneous."); Merritt v. Wilkerson, 360 S.W.2d 283, 287-288 (Mo.App. 1962) (argument held improper and prejudicial; overruling objection was abuse of discretion, and as the error materially affected the merits of the action, it was reversible error); Haake v. G.H. Dulle Milling Co., 168 Mo.App. 177, 153 S.W. 74, 75 (Mo.App. 1912) (judgment on jury verdict reversed where plaintiff's counsel asked jury how many of them would have their arm torn off their body for a sum of money; stating that the "only purpose the speaker had, or could have had, in making such an argument was to arouse the sympathy and inflame the passions of the jury and coin those emotions into dollars.")

Such argument is ground for reversal if it appears probable the jury was prejudicially affected. Edwards, 412 S.W.2d at 422. Improper argument that jurors should put themselves in the position of one party may be cured by withdrawal of the argument, reprimand or admonition of counsel, or by proper instruction to the jury. Edwards, 412 S.W.2d at 422. In Edwards, the Court stated:

> What the trial court should do when confronted with a particular situation depends upon the nature of the argument, the form and character of the objection, the action requested of the court, the subsequent conduct of the offending counsel and the action counsel takes, and in determining what to do

> the trial judge must take into consideration the parties, the issues, and the general atmosphere of the case.

Id.

In this case, the Plaintiffs' repeated argument that the jury should put themselves "in Plaintiffs' position" or "in Ameristar's position" was plainly inflammatory. The argument was designed to and did influence the jurors to decide the case, not as impartial arbiters of the facts, but as if they were in Plaintiffs' position. In effect, Plaintiffs' counsel told the jury it was all right to decide the case as if they were an interested party. The argument told the jury, in effect, to disregard the Court's instructions in Instruction No. 4 that the burden is on the party who relied upon a proposition to cause them to believe such proposition is more likely to be true than not true. The argument effectively said, "Disregard the Court's instruction that 'you must consider only the evidence and the reasonable inferences derived from the evidence,' and consider instead how you would regard the events if you were in Plaintiffs' position."

If Plaintiffs' counsel had simply told the jury to disregard the Court's instructions, the prejudicial error could not be overlooked. Plaintiffs' argument was far more insidious, in asking the jury to view the case solely from the perspective of the Plaintiffs. This form of argument, antithetical to the jury system and the rule of law, universally condemned as "abhorrent" in case after case for nearly a century, is undeniably improper and in this case, through its repetition over and over, influenced the jury and brought about an unjust verdict.

The courts' repeated universal condemnation of the form of argument used by Plaintiffs as "abhorrent" and "clearly improper" for more than ninety years has done nothing to remove

the temptation--and financial incentive--from speakers to ask jurors to put themselves in plaintiffs' position, an argument whose "only purpose" could be to arouse sympathy, inflame passions, and coin those passions into dollars. Affirming judgments obtained by such insidious and improper argument makes any statement of condemnation of the form of argument as improper, unjust and abhorrent merely a formalistic, hollow and meaningless exercise. The only effective way to curtail the abhorrent practice is to take away the financial incentive, by reversing judgments obtained through urging the jurors to put themselves in a party's position.

VIII. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL AND REQUEST FOR REMITTITUR BY REASON OF THE EXCESSIVENESS OF THE VERDICT BECAUSE A VERDICT THAT IS SO GROSSLY EXCESSIVE AS TO INDICATE BIAS, PASSION OR PREJUDICE SHOULD BE SET ASIDE, IN THAT THE VERDICT FINDING $2.1 MILLION IN DAMAGES AND ALLOCATING 70% FAULT TO DEFENDANT, ON THE RECORD IN THIS CASE, IS GROSSLY EXCESSIVE FOR THE REASON THAT THE RECORD REFLECTS THAT DODSON DID NOT CAUSE ANY DAMAGE TO THE AIRCRAFT, DID NOT CAUSE ANY DECREASE IN THE MARKET VALUE OF THE AIRCRAFT, DID NOT CAUSE PLAINTIFFS LOSS OF USE OF THE AIRCRAFT AND THE VERY LARGE AWARD COMPRISING LOST PROFITS IS BASED ON SPECULATION IN THE ABSENCE OF EVIDENCE OF PAST PROFITS, ACTUAL DATA OR DEDUCTION OF OVERHEAD AND OTHER EXPENSES, AND THE VERDICT REFLECTS THAT THE JURY PUT THEMSELVES "IN PLAINTIFFS' POSITION" AS URGED BY COUNSEL FOR PLAINTIFFS, AND EVIDENCES BIAS, PASSION AND PREJUDICE.

Standard of Review

The trial court's ruling on a motion for new trial or for remittitur is reviewed for abuse of discretion. The trial court has broad discretion in ordering remittitur because the ruling is based upon the weight of the evidence, and the trial court is in the best position to weigh the evidence. Barnett v. La Societe Anonyme Turbomeca France, 963 S.W.2d 639, 656-57 (Mo.App. 1997), cert. denied, 525 U.S. 827, 119 S.Ct. 75, 142 L.Ed.2d 59 (1998). The appellate court will interfere only upon a finding that the trial court's ruling constituted an arbitrary abuse of discretion.

Argument

The verdict finding $2.1 million in damages and allocating 70% fault to Defendant is excessive because the evidence showed Dodson did not damage the aircraft, and there was no substantial evidence Dodson caused any decrease in the market value of the aircraft or caused Plaintiff the loss of use of the aircraft, and there was no nonspeculative evidence of lost profits, all as more fully set forth under Points II and V. The verdict was so excessive that it indicates the jury was influenced by bias, passion or prejudice.

The verdict evidences that the jury accepted Plaintiffs' counsel's invitation that they put themselves "in Plaintiffs' position." The amount of the verdict flies in the face of the facts that the aircraft itself was not damaged, that the market value of the aircraft was not diminished, that any loss of use was directly caused by plaintiffs' twice deciding not to repurchase the aircraft, and that there was no sufficiently definite proof of lost profits. Certainly, any amount representing claimed lost profits should be remitted because of the failure of indispensable proof of actual income and expenses to support such an award. The amount of the award on the facts presented is grossly excessive and indicates bias, passion or prejudice.

Moreover, relief from the excessive verdict is authorized under § 537.068, RSMo, which provides that "[a] court may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages." On the record presented, remittitur should be granted because any award for loss of profits is without substantial supporting evidence, and the amount awarded exceeds fair and reasonable compensation for any loss to Plaintiffs.

CONCLUSION

For the foregoing reasons, Dodson International Parts, Inc. respectfully suggests that this Court should reverse the Judgment of the trial court and remand the case with instructions that the trial court enter Judgment in favor of Dodson International Parts, Inc., or order remittitur of all amounts representing claimed lost profits or in the alternative that this Court reverse and remand the case for a new trial on all issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the diskette accompanying this Brief has been scanned and found to be free of viruses; that this Brief contains 28,896 words exclusive of the cover, certificate of service, certificate required by Missouri Supreme Court Rule 84.06(b) and signature block and complies with the limitations contained in Rule 84.06(b); and that on this 3rd day of June, 2004, one copy of this Brief in the form specified by Rule 84.06(a) and one copy of the disk required by Rule 84.06(g) was mailed, via U.S. Mail, postage prepaid, to:

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APPENDIX

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